Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation, ET AL.,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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June, 1977

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In the
Supreme Court of the United States
OCTOBER TERM, 1976

No. .....

CHICKASHA COTTON OIL COMPANY, a corporation; FARMERS UNION COOPERATIVE GIN AT MARTHA; HARMON COUNTY COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT DILL CITY; FARMERS UNION COOPERATIVE GIN AT SENTINEL; PLANTERS COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT ELK CITY; FLEET-TERRAL GIN COMPANY; COTTON FARMERS COOPERATIVE GIN; FARMERS COOPERATIVE GIN AND LUMBER; LINCOLN PROPERTY CO.; RODEWAY INNS, INC.; and G.E.M. 15, INC.; J. H. FRATES and JOHANNA I. FRATES, TRUSTEES; THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC.; CRYSTAL BOWL, INC., a corporation; HARVARD LANES, INC., a corporation; ROSE BOWL LANES, INC., a corporation; SAHOMA BOWLING LANES, INC., a corporation; SHERIDAN LANES, INC., a corporation; TIFFANY BOWL, INC., a corporation; YALE BOWL, INC., a corporation; and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Chickasha Cotton Oil Company, et al., hereby petition the Supreme Court of the United States

of America for Writ of Certiorari to review the denial of a writ of prohibition and injunction by the Supreme Court of the State of Oklahoma and for cause state:

I.
OPINIONS BELOW

The majority and dissenting opinions whereby the writ of prohibition was denied after rehearing are unofficially reported in 48 O.B.A.J. 612 and officially reported in 562 P.2d 507 (Okl. 1977) (Appendix A, A-7).

II.
JURISDICTION

Jurisdiction is invoked on the grounds of denial of due process and impairment of Petitioners' contract rights under the United States Constitution. The decree sought to be reviewed was entered March 8, 1977. Same was adopted by Order dater March 7, 1977 (Appendix A-12). This Court has jurisdiction to review the decree by virtue of Title 28 U.S.C.S. § 1257.

III.
QUESTIONS PRESENTED FOR REVIEW

1. Where the Oklahoma Corporation Commission requires, by rule, a meaningful public hearing at which interested persons can file responses, present their views and evidence, and cross-examine witnesses, upon any application by a utility to revise its rates and tariffs, does due process of law under the Fifth and Fourteenth Amendments to the United States Constitution require adequate notice of said hearing be given to those interested persons affected by said proposed tariff and rate revisions?

2. When notice of a hearing is required by due process of law, does due process of law require that the notice sufficiently apprise the persons receiving it clearly of the character of the governmental action proposed and of the basis on which the proposal rests to enable them to intelligently prepare for the hearing?

3. Under the following facts, were the Petitioners (customers of The Public Service Company of Oklahoma) given notice of the rate hearing sufficient to apprise them clearly of the character of the proceedings and sufficient to enable them to prepare intelligently for the hearing:

a. Where the Application before the Corporation Commission provided that Applicant, The Public Service Company of Oklahoma, was seeking authorization "to adjust its rates to provide an additional $20,150,-000.00 in annual revenue and *to spread the increase equally through its rates*" (emphasis ours);

b. Where notice was published by legal publication which provided: "that the above-named Applicant has filed an Application alleging that its earnings from electrical utilities service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma . . ."; and which also provided: "IT IS FURTHER ORDERED that after hearing, the Commission regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair,

reasonable and equitable in the premises, whether or not specifically prayed for in the Application";

c. Where the Applicant, prior to hearing, mailed to each of its customers a "flyer" stating that because of increase in costs for labor, fuel, equipment, and taxes, it had applied "for an additional $20 million in annual revenue, to be applied to all customers. If the Commission approves our request, *each customer will pay proportionate share of the increase*" (emphasis ours);

d. Where the above quoted language in paragraph "c" was published by said utility as advertisements in newspapers in general circulation through the area served;

e. And when said hearing from its very inception actually concerned itself with the restructuring of rates which had the ultimate effect of tremendously inproportionate and unequal rate increases to the customers of the utility and no evidence was offered by The Public Service Company or anyone else in support of a general rate increase that would be borne proportionately by its customers, which was the relief requested in the Application and advertised.

4. Where the Rules of the Oklahoma Corporation Commission require a utility seeking rate and tariff revisions to file a written application setting forth, inter alia, the facts upon which the right to relief is based and a brief statement of the relief sought, and in conjunction with said application to file and publish a notice setting forth the nature of the application and relief sought, and said Rules

further give interested parties the right to intervene, make discovery, offer testimony and evidence, and cross-examine witnesses, with respect to said proceedings, and where said Rules further provide that when an applicant desires to seek relief of any nature not encompassed by the original notice, a supplemental application must be filed and supplemental notice published, are the requirements of due process of law met when the nature of the relief proposed and the relief granted by the Oklahoma Corporation Commission is not encompassed in the original application and notice and no supplemental application or notice setting forth the new relief proposed is required or filed?

5. Where Plaintiff class (under the alternative cause of action in the Petition for Writ of Prohibition) composed of cotton ginners, had contracts with The Public Service Company of Oklahoma providing for rates and charges during both the three-month ginning season and the rest of the year when no electricity was being used, can said contracts be abrogated at a hearing had with the notice of the said class as set forth hereinabove in paragraph 3 without violation of either the impairment of contracts or due process clauses of the United States Constitution?

6. Where the Petitioners in the original action for Writ of Prohibition before the Supreme Court timely filed, pursuant to rule of the Supreme Court, a motion to refer cause to referee for purpose of taking testimony and hearing evidence, and where said motion was never ruled upon by the Oklahoma Supreme Court, nor were said Petitioners otherwise granted the right and opportunity to offer testimony and evidence other than that contained in the record before the Corporation Commission in support of their

claim that they were given inadequate and misleading notice of the rate hearing and as to the effect of the Order of the Corporation Commission upon their contracts and rates, did the Supreme Court of Oklahoma violate due process of law under the Fifth and Fourteenth Amendments of the United States Constitution?

IV.
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and rules and regulations which this case involves are set forth verbatim in the Appendix, citations are as follows:

a. U. S. Const. amend. V (Appendix D)
b. U. S. Const. amend. XIV (Appendix D)
c. U. S. Const. art. I, §10(1) (Appendix D)
d. Okla. Const. art. IX, §18 (Appendix E)
e. Okla. Const. art. IX, §20 (Appendix E-3)
f. Okla. Sup. Ct. R. 38 (Appendix E-5)
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o. Okla. Corp. Comm. R. Prac. 20 (Appendix E-16)
p. Okla. Corp. Comm. R. Prac. 21 (Appendix E-17)
q. Okla. Corp. Comm. R. Prac. 22 (Appendix E-18)

V.
STATEMENT OF THE CASE

Those Petitioners comprised of Chickasha Cotton Oil Company and the co-op cotton gins brought an original suit in the Oklahoma Supreme Court seeking Writ of Prohibition and Injunction against the Oklahoma Corporation Commission and The Public Service Company of Oklahoma (Appendix B). The original Petition set forth two alternative causes of action: (1) as a class action on behalf of Petitioners and all classes of persons receiving electrical service from The Public Service Company of Oklahoma under tariffs in effect prior to April 15, 1975; and (2) the alternative cause of action sought relief on behalf of all cotton gins served by The Public Service Company of Oklahoma pursuant to contracts and special tariffs based thereupon. All other Petitioners herein intervened in the suit in support of the original Plaintiffs. The material facts are as follows:

On December 3, 1974, The Public Service Company of Oklahoma filed with the Oklahoma Corporation Commission its Application in Cause No. 25346 (Appendix B-13) praying:

> "That the Corporation Commission of the State of Oklahoma, after giving notice of hearing and after appropriate investigation and hearing as prescribed by its Rules, authorize Applicant to adjust its rates to provide an additional $20,150,000.00 in annual revenue *and to spread the increase equally throughout its rates* to permit a reasonable return on its equity capital and permit Applicant to earn a fair and adequate rate of return on the fair value of its plant, property, and other assets devoted to public utility service in the State of Oklahoma." (emphasis added)

The Application stated that the request would amount to an increase of 12.5%. The Application made no mention of restructuring rates or abrogating special classes of tariffs which were then on file, or of abrogating any contracts.

Oklahoma Corporation Commission Rules of Practice, and particularly Rule 11 (Appendix E-6), require that the party commencing a proceeding file with the initial pleading an Order Setting Cause for Hearing, and a Notice of Hearing, stating the date upon which the cause is set for hearing. Various other rules (Appendix) set forth the manner of service of notice and procedure followed at the hearing, all of which rules reflect the clear intent to afford all interested persons an opportunity to file pleadings, offer testimony and evidence, cross-examine witnesses prior to and at the rate hearing. Pursuant to Commission rules, and on January 19, 1975, Notice and Order Setting Cause for Pre-hearing and Hearing (Appendix B-16) was filed and issued in said cause before the Oklahoma Corporation Commission which Notice provided in pertinent part:

> "Notice is hereby given that the above-named Applicant has filed an Application alleging that its earnings from electrical utilities service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma . . .
>
> "IT IS FURTHER ORDERED that after hearing, the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application."

The Notice made no mention of either rate restructuring, abrogation of special classes of tariffs or of abrogation of contracts. In addition to publishing the Notice as required under the Corporation Commission Rules, The Public Service Company of Oklahoma mailed flyers to Petitioners and caused to be published certain advertisements in various newspapers throughout the area served by it, stating:

> "Our company has asked the Oklahoma Corporation Commission for an additional $20 million in annual revenue, to be applied to all customers. If the Commission approves our request, *each customer will pay a proportionate share of the increase.*" (emphasis ours)

Said mailings and publications were made on or near March 6, 1975, subsequent to the Pre-hearing on February 19, 1975 and prior to Hearing on Merits on March 19 and 20, 1975. The "restructuring" proposal was known by Respondents at least at the Pre-hearing Conference.

The Application cited as ground for its proposed increase in rates, "increase in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities" (Appendix B-14).

No language appeared in any of the notices, mailings, or newspaper advertisements that The Public Service Company of Oklahoma proposed to restructure existing rate classes and abrogate special classes of tariffs or contracts then on file. At some point in time prior to the Pre-hearing

and Hearing dates, The Public Service Company of Oklahoma or the Corporation Commission, or both, decided to change the general rate increase proceedings into a proposal to restructure existing rates abrogating special classes of tariffs and contracts. No supplemental application or notice was filed as required by Oklahoma Corporation Commission Rules of Practice (OCCRP), Rule No. 14(f) (Appendix E-12).

Petitioners did not object to an across-the-board 12.5% rate increase, as originally proposed in the Application and as advertised, and therefore did not attend any of the Corporation Commission hearings. On April 15, 1975, the Corporation Commission entered its Findings and Order (Appendix B-22) from the Pre-hearing and Hearings had in said cause, which provided in pertinent part:

> "This record reveals that Applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, and thus the proposal to restructure into nine rates is absolutely necessary and clearly in the public interest. However, this re-structuring and the harsh immediate economic impact on customers has bothered and concerned the Commission during these entire proceedings."

The Commission thereupon found that the rates should be restructured and ordered new tariffs to be filed in accordance with its findings and upon filing and approval of such tariffs, vacated and cancelled all current tariffs. The effect of the wholesale restructuring of rates was that Petitioners, under the new tariffs, were forced to bear significantly greater than proportional share of the revenue

increase, contrary to the notice given. Even from the testimony offered by The Public Service Company of Oklahoma before the Corporation Commission, some classes of its customers would have increases far in excess of 50% (Appendix C-2). None of these customers so severely affected, however, appeared at the hearing, as they believd the hearing to be concerned with a general rate increase to be borne proportionately by all customers of The Public Service Company. This belief was based upon the flyers, advertisements, and language of the Application of The Public Service Company. The legal notice published by the Oklahoma Corporation Commission only re-enforced these beliefs.

Petitioners, on October 3, 1975, filed an original action in the Supreme Court of Oklahoma for a Writ of Prohibition (Appendix B) to prohibit and enjoin the Oklahoma Corporation Commission from enforcing and The Public Service Company of Oklahoma from collecting the increased rates on the grounds that the Corporation Commission Order was void due to inadequate content of and misleading notice of the rate hearing. The constitutional questions of notice and due process of law and impairment of contract rights were initially raised in the Petition for Writ of Prohibition and Injunction and were treated at length in the briefs. Said constitutional questions were the crux of Petitioners' case throughout the original proceedings before the Oklahoma Supreme Court. Paragraph 9(d) in the First Cause of Action in said Petition and paragraph 8(d) in the Alternative Second Cause of Action in said Petition alleged:

> "Said Findings and Order was entered by the Oklahoma Corporation Commission in the absence of giving

to the members of Plaintiffs' class notice as required by due process of law and as provided in the 5th and 14th Amendments of the Constitution of the United States of America."

Petitioners' briefs before the Supreme Court of Oklahoma cited almost all of the authority cited hereinafter in Petitioners' argument.

Also, in Petitioners' brief, Petitioners quoted at length from *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U.S. 379, 43 S.Ct. 387, 67 L.Ed. 705, and stated in its brief:

> "On the basis of the above, clearly, a hearing must be had and findings of unfairness to the public made before a contract can be abrogated." (Plaintiffs' Reply Brief, filed January 20, 1976, at p. 23.)

On October 16, 1975, Petitioners filed a Motion to Refer Cause to Referee for Purpose of Taking Testimony and Hearing Evidence, but no disposition was made of the Motion. The Supreme Court considered the case on briefs of the parties and on October 12, 1976, entered its first decision (Appendix A-14) granting the Writ of Prohibition and holding that the Oklahoma Corporation Commission Order was void and invalid because of lack of adequate notice content.

On October 22, 1976, and October 27, 1976, The Public Service Company of Oklahoma and the Oklahoma Corporation Commission, respectively, petitioned for rehearing and thereafter various public utility companies doing business in the State of Oklahoma moved to file Amicus Curiae Briefs in support of the Petition for Rehearing. The Court

allowed intervention of Amicus Curiae and again considered the case on briefs. On March 8, 1977 the Supreme Court of Oklahoma reversed itself on Petition for Rehearing and denied the Writ of Prohibition on grounds that the Corporation Commission was not required to give "judicial due process notice" and hearing to the Petitioners (Appendix A). Specifically the Court dealt with due process as follows:

> "We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners, unless specifically required by statute. There is no present statutory provision requiring notice."

The Oklahoma Supreme Court failed to refer to the abrogation of contract rights without a hearing and notice to those directly affected.

A dissenting opinion was filed concurred in by three justices and holding that the Order of the Corporation Commission was void for lack of adequate notice (Appendix A-7).

VI.
CONCISE ARGUMENT

The Oklahoma Supreme Court in the case at bar held that due process of law under the Fourteenth Amendment does not require notice of a public rate hearing before the Corporation Commission, which said hearing was required by rules enacted by the Oklahoma Corporation Commission. This holding is inconsistent with the holding of the United States Supreme Court in *Morgan* v. *United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

To the extent that *Morgan* v. *United States, supra*, dealt with the issue of the requirement of a hearing as opposed to the requirement of a notice of the hearing, it is possibly distinguishable. This distinction, however, has no merit since the requirement of a hearing is meaningless unless there is also given adequate notice of the hearing. The United States Supreme Court in *Londoner* v. *Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908), held that where a taxpayer shall have a hearing, he must have notice, either personal, by publication, or by law fixing the time and place of the hearing.

Having held that due process of law did not require notice in the case at bar, the Oklahoma Supreme Court did not treat the issue of whether the content of notice met due process standards of fair-play.

It is submitted that to the extent the decision of the Oklahoma Supreme Court could be construed to have held that due process standards were met, such a holding under the uncontroverted facts before the Oklahoma Supreme Court is contrary to *West Ohio Gas Co.* v. *Public Utilities*

Commission of Ohio, 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761 (1935). Notice of a hearing which fails to afford an interested party the opportunity to intelligently prepare for the hearing is at variance with "the rudiments of fair play." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio, supra.* Petitioners submit this is even more true when the totality of the notice is actually misleading as to the nature and scope of the hearing.

The Oklahoma Supreme Court dealt with Petitioners' assertion that the Oklahoma Corporation Commission's own rules required supplemental application and notice of hearing when there is a change in the relief proposed by stating that the form of the original published notice said that the Oklahoma Corporation Commission, regardless of the relief requested, would grant "such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, . . ."

Then said the Oklahoma Supreme Court:

> ". . . This clearly advised all consumers that the Commission might adjust rates in any manner allowed by law . . .".

Such treatment of this issue, it is submitted, begs the question, to-wit: What does the law allow under these facts concerning adjustment of rates? The Supreme Court of Oklahoma is saying very clearly that the law allows a public utility to file an application seeking one form of relief clearly distinguishable from that upon which it offers evidence—even after advertising in no uncertain terms the nature of the relief the utility is originally seeking—and without further supplemental application and notice the

Commission may grant relief clearly distinguishable from that originally sought. Relief which, even as reflected in the record before the Corporation Commission, was to have a much different effect upon the utility's customers than that which was applied for and advertised.

Not only was OCCRP Rule 14(f) (Appendix E-12) requiring supplemental application and notice, ignored by the Supreme Court of Oklahoma, it was impliedly held to have no meaning.

Petitioners add that the majority opinion of the Oklahoma Supreme Court (Appendix A) likewise omitted any discussion or mention of the misleading flyers and advertisements published by Respondent, The Public Service Company of Oklahoma, which flyers and advertisements were made a part of the record before the Corporation Commission.

The Oklahoma Supreme Court in effect held that, even though the rules of the Oklahoma Corporation Commission require a public hearing on any proceedings for a rate revision and further require a supplemental application and notice be filed in the event there is a change between the relief originally requested and the relief requested at the hearing, the Oklahoma Corporation Commission need not comply with its own rules nor require due process notice of the hearing. This holding is in direct conflict with the holdings of the United States Supreme Court in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 89 L.Ed. 681 (1954); *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709.

The Oklahoma Supreme Court by implication held that the contracts for rates and services existing between The Public Service Company and the class of cotton ginners represented by Petitioners may be abrogated in the absence of a hearing specifically for that purpose and further in the absence of notice to the class of cotton ginners represented by Petitioners of a hearing for that purpose. This holding is in direct conflict with the holding of the United States Supreme Court in *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U.S. 379, 43 S.Ct. 387, 67 L.Ed. 705 (1923).

The Oklahoma Supreme Court in the case at bar by implication (*i.e.* failure to rule on Petitioners' Motion for evidentiary hearing) held the Petitioners were not entitled to an evidentiary hearing upon the adequacy of the notice published to them, nor upon the effect of the rate revisions on their contracts with The Public Service Company. This holding is inconsistent with *Cary* v. *Corporation Commission of Oklahoma*, 9 F.Supp. 705 (1935), *affirmed* 296 U.S. 452, 56 S.Ct. 300, 80 L.Ed. 324.

The specific issues raised herein have been decided favorably to Petitioners' claim herein in *Virgin Islands Hotel Ass'n* v. *Virgin Islands W. & P. Auth.*, 465 F.2d 1272 (3d Cir. 1972); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969); *Wagner Electric Corporation* v. *Volpe*, 466 F.2d 1013 (3d Cir. 1972); *Pacific Molasses Company* v. *Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966); *Pharmaceutical Manufacturers Association* v. *Finch*, 307 F.Supp. 858 (Del. 1970); *Chicago, Burlington & Quincy Railroad Co.* v. *United States*, 242 F.Supp. 414 (N.D. Ill. 1965); and *Re Public Service Co. of Indiana, Inc.*, 21 PUR3d

310 (1957). It is submitted there is no good reason why the same due process standards of fair-play which require adequate notice of hearings when Federal regulatory bodies act should not also apply to state regulatory bodies.

Petitioners realize that Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Aside from the above-stated violations of the fundamental concepts of fair-play, Petitioners submit there are other important reasons for this Court granting Certiorari.

Much more is involved than just these Petitioners' right to adequate notice of the subject rate hearing. Rate hearings have become increasingly more important and complex since the mid 1960's. Rate hearings will become even more important in the future. Due to the shortages of fuel and the natural desire for conservation, drastic changes in rate structuring, as well as pricing, are becoming more common. Drastic changes in rate structuring, as opposed to mere general increases in the cost of electricity to the consumer, require the consideration by the regulatory body of evidence unique to the particular classes of customers which are affected differently by the restructuring. Unless those particular classes of customers to be affected by the restructuring are given notice of the restructuring proposal adequate to *at the very least* apprise them that the proposal is to restructure rates, they hardly are given the opportunity to offer evidence, testimony and cross-examine before the regulatory body. Thus the only evidence which the regulatory body has is that emanating from the utility itself. Such, it is submitted, is hardly akin to the "rudiments of fair-play."

VII.
CONCLUSION

For reasons stated, Petitioners respectfully request that a Writ of Certiorari should issue to review the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

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Attorney for Petitioners

June, 1977

CERTIFICATE OF SERVICE

I, Terry Shipley, a member of the Bar of the Supreme Court of the United States and counsel of record for the Petitioners, hereby certify that on the ..... day of June, 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the following parties:

Rex Privett, Chairman of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Larry Derryberry, Attorney General
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Attorney for The Public Service Company
of Oklahoma

by depositing said copies in the United States Mail, properly addressed and postage fully prepaid, this ..... day of June, 1977.

All parties required to be served have been served.

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APPENDICES

APPENDIX A

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 8 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

vs.

No. 48,956

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a

limited partnership, and FRATES PROPERTIES, INC., CRYSTAL BOWL, INC., a corporation, HARVARD LANES, INC., a corporation, ROSE BOWL LANES, INC., a corporation, SAHOMA BOWLING LANES, INC., a corporation, SHERIDAN LANES, INC., a corporation, TIFFANY BOWL, INC., a corporation, and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Intervenors.

Petition asking the Court to Assume Jurisdiction and to prohibit the Corporation Commission from enforcing new rates promulgated in Corporation Commission Order No. 112286 in Corporation Commission Cause No. 25346.

JURISDICTION ASSUMED;
WRIT OF PROHIBITION DENIED.

Terry Shipley
Noble, Oklahoma — For Petitioners,

Jack Swidensky
General Counsel
Oklahoma Corporation Commission
Oklahoma City, Oklahoma
and
Robert L. Lawrence
Tulsa, Oklahoma — For Respondents,

Harry M. Crowe, Jr.
Crowe & Thieman
Tulsa, Oklahoma
Charles E. Norman
Rizley, Prichard, Ford, Norman & Reed
Tulsa, Oklahoma

E. H. Gubser
Tulsa, Oklahoma

Larry B. Ferguson
and
Kenneth C. Ellison
Tulsa, Oklahoma — For Intervenors.

BARNES, J.:

This is a class action brought on behalf of Petitioners and all classes of persons receiving electrical service from The Public Service Company of Oklahoma (PSC) under special tariffs which were in effect prior to April 15, 1975, asking that PSC be prohibited from charging and that the Corporation Commission be prohibited from enforcing the new rates promulgated in Corporation Commission Order No. 112286, promulgated April 15, 1975, in Corporation Commission Cause No. 25346.

We are here confronted with the question of what notice, if any, must be given to customers of a public utility before its rates can be changed by the Corporation Commission. The Oklahoma Constitution, which gives rate-making authority to the Corporation Commission, provides for notice to the utilities (Article 9, § 18), but it does not provide for notice to a patron of the utility. This was recognized and explained in the case of *American Indian Oil & Gas Co.* v. *Geo. F. Collins & Co.*, 9 P.2d 438 (Okl. 1932), where this Court stated:

> " * * * There is no merit in that contention. Consumers are not necessary parties before the corporation commission in a rate hearing and they are not necessary parties in the federal court in an action to enjoin the corporation commission from enforcing a rate fixed by it. Neither the Constitution of the State of Oklahoma nor the legislative enactments require notice to be given a consumer. *The corporation commission represents the consumer and its orders fixing rates are for*

the benefit of the consumer. In Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 46 S.Ct. 408, 410, 70 L.Ed. 747, that court held: ' * * * the commission represents the public and especially the subscribers, and they are properly bound by the decree.' " (Emphasis added)

Petitioners do not question the Corporation Commission's authority to issue such an order, but allege that the notice given them was inadequate to afford them judicial due process. They contend that the due process clause of the Fourteenth Amendment to the United States Constitution requires that notice and hearing be afforded them, and that in the absence of such notice the Corporation Commission's order is void.

This Court has repeatedly held that the power to fix rates in Oklahoma is a legislative function. In *Wiley* v. *Oklahoma Natural Gas Company,* 429 P.2d 957 (Okl. 1967), it was asserted that certain rate increases were void because the Commission was influenced by contributions and favors received from a lobbyist of the gas company. We said:

"It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules."

And further:

"It is argued that this Court may vacate the Commission's rate orders established in 1957 and 1963 and order refunds without fixing rates for Oklahoma Natural Gas Company. In Consumers' Gas Co. v. Corporation Commission, 95 Okl. 57, 219 P. 126, this Court held that a natural gas utility is entitled to earn a reasonable return on its investment and a reasonable amount for depreciation and amortization. To hold otherwise would authorize the taking of private property without just compensation, contrary to constitutional provisions.

How it is possible for this court to strike down the 1957 and 1963 rate orders and thus re-establish rate structures existing prior to 1957 without taking into consideration the financial requirements of the Company during a ten year period of constantly changing state and national economy without fixing rates has not been explained.

"It is is patent that we could not determine the amount of the alleged 'overpayments' and order refunds without either legislating new rate schedules to replace the allegedly void ones, or legislatively placing in effect anew the rate schedules adopted by the Commission prior to 1957."

In *Southern Oil Corporation* v. *Yale Natural Gas Co.,* 214 P. 131 (Okl. 1923), the contention was made that the plaintiff should have received notice of the Corporation Commission's hearing which resulted in its contractual rate for the purchase of natural gas being abrogated. There we held:

"The contention of plaintiff that it was entitled to notice of the proceedings in which the Corporation Commission established the rate for gas to be charged by the defendant at 15 cents per 1,000 cubic feet, thereby terminating its contractual rights, is likewise without merit. This rate was fixed upon the application of the defendant, and no notice to its consumers or patrons was required. Section 18, art. 9, of the Constitution, provides for notice of at least 10 days to be given by the commission to the company or companies to be affected by any rate charge, classification, order, rule, regulation, or requirement. This clearly means that notice shall be given to the public service corporation who is to be affected by said rate, and does not mean that notice must be given to its patrons. Rate making being a legislative power, notice to parties affected by an order of the Corporation Commission, fixing gas

rates upon the application of the public service corporation, need not be given, unless specifically required by statute. City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 Pac. 396."

We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners, unless specifically required by statute. There is no present statutory provision requiring notice.

Petitioners finally contend that the Corporation Commission was bound by its own rules of practice [OCCRP Rules 12(e) and 8(d)(7)]. We find this contention of Petitioners to be without merit because the notice published in this case substantially complied with the Corporation Commission's suggested form of notice by publication, even to the point of stating that "after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application." This clearly advised all consumers that the Commission might adjust rates in any manner allowed by law. Petitioners do not contend that restructuring of classes is not an adjustment of rates.

Jurisdiction assumed; Application for Writ of Prohibition denied.

LAVENDER, V.C.J., and DAVISON, WILLIAMS, IRWIN and BERRY, JJ., concur.

HODGES, C.J., and SIMMS and DOOLIN, JJ., dissent.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

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SUPREME COURT
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CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER, Petitioners,	)	
v.	)	No. 48,956
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation, Respondents,	)	
v.	)	
LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a limited partnership, and FRATES PROP-	)	

ERTIES, INC., CRYSTAL BOWL, INC., a corporation, HARVARD LANES, INC., a corporation, ROSE BOWL LANES, INC., a corporation, SAHOMA BOWLING LANES, INC., a corporation, SHERIDAN LANES, INC., a corporation, TIFFANY BOWL, INC., a corporation, YALE BOWL, INC., a corporation, and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Intervenors.

HODGES, C.J., Dissenting:

The sole issue in this case is whether the "Notice" given was adequate and sufficient to apprise the petitioners that a restructuring of rates among the various classes of tariffs in existence was to be considered at the rate hearing before the Corporation Commission. A recitation of the following facts is necessary for a proper understanding of this issue.

On December 3, 1974, The Public Service Company of Oklahoma (PSC) filed an application seeking additional revenue by distribution of a 12.5% rate increase equally among its customers. The application did not mention a proposal to restructure rates. On December 9, 1974, a notice prepared by the Corporation Commission, after rejection of notice prepared by PSC, was issued which provided in pertinent part:

> "Notice Is Hereby Given that the above named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return

> on its plant, property, and other assets devoted to public utility service in Oklahoma.
>
> * * * * * *
>
> "It Is Further Ordered that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.
>
> "It Is Further Ordered that after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application."

The notice was published and PSC mailed flyers to its customers advising them a rate increase was being sought. It also advertised in certain newspapers that "each customer will pay a proportionate share of the increase." Nothing appeared in any of the notices, mailings, or newspaper advertisements alluding to restructuring of PSC's rates. No further notices were given.

Petitioners do not assert that PSC was not entitled to a rate increase, nor that restructuring of rates might not have been appropriate had proper notice been given. They allege that they were denied due process because of the insufficient, inadequate, and misleading notice given by the Corporation Commission. Instead of determining an adjustment in the rates as the notice stated would be done, the Corporation Commission ordered a restructuring of rates

which abrogated various classes of special tariffs without notice to those affected by the change in rate structure.

The Corporation Commission argues that the clause stating it would grant whatever relief necessary rendered the notice inadequate. I do not agree. The notice did not adequately or meaningfully apprise petitioners of the subject matter of the action. Instead it notified them that a hearing would be held on a matter to which they had no objection, i.e., a proportionate increase in rates to be shared equally by all customers.

Notice is a jurisdictional requirement as well as a fundamental requisite of due process. Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner. The right to be heard is of little value unless adequate notice is given, and due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action.[1]

The failure of due process is amply demonstrated in this case by the fact the Corporation Commission and PSC both knew and realized a "restructuring of rates" was to be an important and integral part of the hearing.

Therefore, in my opinion, the Corporation Commission did not have jurisdiction to enter an order restructuring the rates and the cause should be remanded to the Corporation Commission for further proceedings after issuance of proper notice.

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[1] *Boddie* v. *Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 119 (1971); *Armstrong* v *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Schroeder* v. *New York*, 371 U.S. 208, 211, 83 S. Ct. 279, 9 L. Ed. 2d 252, 89 A.L.R. 2d 1398 (1962); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 (1915); *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363, 1369 (1914); *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968); *Simms* v. *Hobbs*, 411 P.2d 503, 510 (Okla. 1966).

However, this Court has a duty to guard against any attempt to upset settled and established rate structures by imposition of new requirements which did not exist before; therefore, I would recognize that all procedural modifications enunciated herein should not be construed as invalidating the notice procedures in any other circumstance other than in the case before us, and that the application of the imposition of proper notice standards and procedures should be prospective only except as to the petitioners herein.[5]

I am authorized to state that Justice Simms and Justice Doolin concur in the views herein expressed.

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[5] See *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 721 (Okla. 1968).

IN THE SUPREME COURT OF THE
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CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

vs.

No. 48,956

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC., CRYSTAL BOWL, INC., a corporation, HARVARD LANES, INC., a corporation, ROSE BOWL LANES, INC., a corporation, SAHOMA BOWLING LANES, INC., a corporation, SHERIDAN LANES, INC., a corporation, TIFFANY BOWL, INC., a corporation, and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Intervenors.

ORDER

IT IS ORDERED that the opinion of this Court heretofore promulgated on October 12, 1976, appearing in 47 O.B.J. 2326, shall be and the same is hereby withdrawn. The opinion of this Court adopted this date is promulgated in lieu thereof and as a substitute for said earlier opinion.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7th day of March, 1977.

s/ Ralph B. Hodges
CHIEF JUSTICE

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT 12 1976
Ross N. Lillard, Jr.
CLERK

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

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Intervenors.

No. 48,956

APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND
FOR WRIT OF PROHIBITION

Original proceeding involving application to assume original jurisdiction and petition for writ of prohibition and injunction to prevent the Corporation Commission of the State of Oklahoma from enforcing its order; enjoining Public Service Company of Oklahoma from charging rates and tariffs pursuant to the order and to declare the order void and invalid because of lack of adequate notice.

ORIGINAL JURISDICTION ASSUMED
WRIT OF PROHIBITION GRANTED

Terry Shipley
Noble, Oklahoma — For Petitioners,

Jack Swidensky
General Counsel
Oklahoma Corporation Commission — For Respondents,

Robert L. Lawrence
Tulsa, Oklahoma

Harry M. Crowe, Jr.
Crowe & Thieman
Tulsa, Oklahoma

Charles E. Norman
Rizley, Prichard, Ford, Norman & Reed
Tulsa, Oklahoma — For Intervenors.

E. H. Gubser
Tulsa, Oklahoma

Larry B. Ferguson and
Kenneth C. Ellison
Tulsa, Oklahoma

HODGES, V.C.J.

This is a class action brought on behalf of petitioners and all classes of persons receiving electrical service from The Public Service Company of Oklahoma (PSC) under special tariffs which were in effect prior to April 15, 1975. On December 3, 1974, PSC filed an application seeking additional revenue by distribution of a 12.5% rate increase equally among its customers. The application did not mention a proposal to restructure rates. On December 9, 1974, a notice prepared by the Corporation Commission, after rejection of notice prepared by PSC, was issued which provided in pertinent part:

> "Notice Is Hereby Given that the above named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma.
>
> * * * * * *
>
> "It Is Further Ordered that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.
>
> "It Is Further Ordered that after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application."

The notice was published and PSC mailed flyers to its customers advising them a rate increase was being sought. It also advertised in certain newspapers that "each customer will pay a proportionate share of the increase." Nothing appeared in any of the notices, mailings, or newspaper advertisements alluding to restructuring of PSC's rates. No further notices were given.

Petitioners do not assert that PSC was not entitled to a rate increase, nor that restructuring of rates might not have been appropriate had proper notice been given. They allege that they were denied due process because of the insufficient, inadequate, and misleading notice given by the Corporation Commission. Instead of determining an adjustment in the rates as the notice stated would be done, the Corporation Commission ordered a restructuring of rates which abrogated various classes of special tariffs without notice to those affected by the change in rate structure.

The Corporation Commission argues that the clause stating it would grant whatever relief necessary rendered the notice adequate. We do not agree. The notice did not

adequately or meaningfully apprise petitioners of the subject matter of the action. Instead it notified them that a hearing would be held on a matter to which they had no objection, i.e., a proportionate increase in rates to be shared equally by all customers.

Notice is a jurisdictional requirement as well as a fundamental requisite of due process. Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner. The right to be heard is of little value unless adequate notice is given, and due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action.[1]

The United States Supreme Court in *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-315, 70 S. Ct. 652, 94 L. Ed. 865, 872-874 (1949), determined the parties should be provided the full opportunity to appear and be heard, the Court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those

[1] *Boddie* v. *Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 28 L. Ed. 2d 119 (1971); *Armstrong* v *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Schroeder* v. *New York*, 371 U.S. 208, 211, 83 S. Ct. 279, 9 L. Ed. 2d 252, 89 A.L.R. 2d 1398 (1962); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 (1915); *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363, 1369 (1914); *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968); *Simms* v. *Hobbs*, 411 P.2d 503, 510 (Okla. 1966).

> interested to make their appearance. * * * but when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In *Schroeder* v. *City of New York*, 371 U.S. 208, 212, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962), the United States Supreme Court said:

> "The requirement that parties be notified of proceedings affecting their legally protected interests is obviously vital corollory to one of the most fundamental requisites of due process—the right to be heard. This right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear, or default, acquiesce or contest."

We find the Corporation Commission was without jurisdiction to enter the order restructuring rates because of inadequate notice, and the cause is remanded to the Corporation Commission for further proceedings after issuance of proper notice. ORIGINAL JURISDICTION ASSUMED. WRIT OF PROHIBITION GRANTED.

CONCURRING: WILLIAMS, C.J., DAVISON, SIMMS and DOOLIN, JJ.

CONCURRING IN RESULT: IRWIN, .

DISSENTING: LAVENDER and BARNES, JJ.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Chickasha Cotton Oil Company, a corporation, Farmers Union Cooperative Gin at Martha, Harmon County Cooperative Association, Farmers Union Cooperative Gin at Dill City, Farmers Union Cooperative Gin at Sentinel, Planters Cooperative Association, Farmers Union Cooperative Gin at Elk City, Fleet-Terral Gin Company, Cotton Farmers Cooperative Gin, Farmers Cooperative Gin and Lumber, Plaintiffs,	)	
vs.	)	No. 48956
The Corporation Commission of the State of Oklahoma and The Public Service Company of Oklahoma, a corporation Defendants.	)	

PETITION FOR WRIT OF PROHIBITION
AND INJUNCTION

COME NOW the above named Plaintiffs and for themselves and on behalf of all others similarly situated allege and state as follows:

1. Jurisdiction of this Court is provided pursuant to Constitution Article 9, Section 20 of the State of Oklahoma, as amended.

I.
FIRST CAUSE OF ACTION

2. Plaintiffs were at all times pertinent herein customers of Public Service Company of Oklahoma, a corporation which is under the authority and jurisdiction of the Corporation Commission of the State of Oklahoma, said Plaintiffs being rendered electric service by the Defendant, Public Service Company of Oklahoma pursuant to several respective special tariffs filed with the Corporation Commission of the State of Oklahoma. Plaintiffs sue on behalf of themselves and all other customers of Public Service Company of Oklahoma which received services and electricity pursuant to special tariffs filed with respect to certain particular classes of customers with the Corporation Commission of the State of Oklahoma.

3. Prior to April 15, 1975 Plaintiffs and all other members of the class received electrical service from Defendant, Public Service Company of Oklahoma as provided by approximately 180 special tariffs, each said special tariff effecting only those particular members of the class provided for therein. Said tariffs are on file with the Corporation Commission of the State of Oklahoma and are made a part hereof by reference thereto.

4. During the time in which the said members of Plaintiff class were receiving electrical service from the Defendant, Public Service Company of Oklahoma, and on or about the 3rd day of December, 1974, said Defendant, Public Service Company filed with the Defendant, Oklahoma Corporation Commission, its application "that the Corporation Commission of the State of Oklahoma after appropriate investigation and hearing as prescribed by its rules, authorize applicant to adjust its rates to provide additional $20,150,000.00 in annual revenue *and to spread the increase equally throughout its rates* to permit a reasonable return on its equity capital and permit applicant to earn a fair and adequate rate of return on the fair value

of its plant property and other assets devoted to public utility services in the State of Oklahoma." (emphasis added) A true and correct copy of said application is attached hereto marked Exhibit "A" and made a part hereof. In summary said application cited as a ground for its proposed increase in rates "increases in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities."

5. Thereafter on or about the 9th day of December, 1974, the Defendant, Corporation Commission of the State of Oklahoma issued its Notice and Order Setting Cause for Pre-Hearing and Hearing wherein in pertinent part said Notice and Order provided as follows:

> "Notice is hereby given that the above-named Applicant has filed an Application alleging that its earnings from electric utilities service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property and other assets devoted to public utility service in Oklahoma."

Said Notice and Order Setting Cause did not state in any additional detail or any further manner exactly what relief and adjustment in rates was being sought and the source for this information was from the language in the Application itself. A true and correct copy of said Notice and Order Setting Cause for Pre-Hearing and Hearing is attached hereto and marked Exhibit "B" and made a part hereof.

Included in said Notice and Order was an order that "Applicant shall cause the above Notice to be published once a week for two consecutive weeks in a newspaper of

general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application."

6. Thereafter the Defendant, Public Service Company of Oklahoma caused to be mailed to various members of the class of Plaintiffs herein certain "flyers" and caused to be published certain advertisements in various newspapers representing that because of inflation, increase cost of labor, fuel, equipment, taxes, the rate increase was necessary and further that "each customer will pay a proportionate share of the increase." Copies of said "flyers" and advertisement hereto marked Exhibits "C-1", "C-2" and "C-3" and made a part hereof.

7. Thereafter Pre-Hearing Conference was held on February 19, 1975 and Hearings were held by the Corporation Commission of the State of Oklahoma on March 19, 20 and 26, 1975. No further notice concerning these Hearings was ordered or given to anyone.

8. Thereafter on the 15th day of April, 1975 the Corporation Commission of the State of Oklahoma entered certain Findings and Order a copy of which said Findings and Order is attached hereto marked Exhibit "D" and made a part hereof. Included in said Findings is the following pertinent language:

> "This record reveals that applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, *and thus the proposal to restructure into nine rates is absolutely necessary and clearly in the public interest.*"

9. Said Order of the Oklahoma Corporation Commission authorized the Applicant in said Cause before the Commission to "restructure" and in effect abolish and abrogate the previous 180 more or less special tariffs relating

to the various 180 special classes and to instigate tariffs divided into nine separate divisions. Said Findings and Order of the Defendant, Oklahoma Corporation Commission are void and invalid as to said Plaintiff class or classes and a writ of prohibition should be issued against the Corporation Commission of the State of Oklahoma from enforcing said Order and the tariffs filed thereunder and an injunction should be issued against Public Service Company of Oklahoma enjoining said Defendant from charging rates based upon the void Order and tariffs for the following reasons:

a. Said Findings and Order was void in its entirety in that same was based and issued upon an Application, which Application of Public Service Company of Oklahoma misrepresented said Applicant's actual proposal, to-wit, said Application represented that Applicant was seeking a general rate increase and "to spread the increase equally throughout its rates" at "an increase of 12.5%." When the true and actual intent of Applicant, as provided in the Findings and Order of the Commission, was in fact, to eliminate and abrogate the various classes created by the then existing tariffs.

b. Said Findings and Order was void in its entirety in that same was based and issued upon inadequate and misleading representations provided in notices, advertisements and "flyers" published to customers of the said Applicant in that said Notices stated that "each customer will pay a proportionate share of the increase"" and made no statement with respect to the proposal to "restructure" the rates and eliminate the various separate classes of users.

c. Said Findings and Order was entered by the Corporation Commission of the State of Oklahoma in the absence of furnishing to the members of the Plaintiff class the opportunity to be heard thereon as to the issue of the need to "restructure" said rates and eliminate said special classes.

d. Said Findings and Order was entered by Oklahoma Corporation Commission in the absence of giving to the members of Plaintiff class notice as required by due process of law and as provided in 5th and 14th Amendments of the Constitution of the United States of America.

e. Said Findings and Order was entered by the Oklahoma Corporation Commission in the absence of having provided members of Plaintiff class with notice as required by Constitution Article 9, Section 18 of the State of Oklahoma.

10. Subsequent to the filing of the tariffs as authorized by the above referred to Order of the Corporation Commission of the State of Oklahoma entered on or about the 15th day of April, 1975, the Public Service Company of Oklahoma has been charging and continues to charge for services to members of Plaintiff class under said tariffs issued pursuant to the void and invalid Findings and Order of the Corporation Commission above referred to.

WHEREFORE Plaintiffs for themselves and for all other members of the class similarly situated pray for the following relief:

1. Judicial declaration by the Supreme Court of Oklahoma that the Findings and Order of the Defendant, Oklahoma Corporation Commission above referred to as Exhibit "D" attached hereto and made a part hereof is void and invalid;

2. An Order prohibiting the Corporation Commission of the State of Oklahoma from enforcing any of the provisions of said Findings and Order referred to herein above and the tariffs filed thereunder;

3. An Order enjoining the Defendant, Public Service Company of Oklahoma from charging rates and tariffs pursuant to the above said Order and an Order requiring the

Defendant, Public Service Company of Oklahoma to remit to the members of Plaintiff class any and all excess payments made by said members of Plaintiff class which were in excess of the previous tariffs on file with the Corporation Commission of the State of Oklahoma by Public Service Company of the State of Oklahoma at the time of the entry of the above referred to Order and Findings;

4. An Order requiring Public Service Company of Oklahoma to pay a reasonable attorneys fee to the undersigned attorney and for costs and expenses all as may be required by law.

II.

ALTERNATIVE SECOND CAUSE OF ACTION

1. Plaintiffs bring this action on behalf of themselves and the class comprised of all other cotton gins in the State of Oklahoma who receive electric service from Defendant, Public Service Company.

2. Under a special tariff, a copy of which is marked Exhibit "E", attached hereto and made a part hereof, Plaintiffs were billed at a monthly rate based on kilowatt hours used. Members of Plaintiff class, being operators of cotton gins, used electricity for the operation of the respective cotton gins during the "off peak" season, to-wit, October through May inclusive and primarily in the months of November, December and January. Said cotton gins, gin no cotton during the "on peak" season (June through September) and thus create no demand for electricity during the part of the year in which the utility's overall demand is the highest. For these reasons and for the further reason that the Defendant, Public Service Company, desired to encourage the cotton gins to convert and/or use electricity as a source of their power rather than other sources, said Defendant, Public Service Company, entered into contracts and filed tariffs, which in effect provided that said cotton gins paid only for the electricity used and during months

in which no electricity was used, paid no minimum monthly bill. Such provisions were extremely important to the cotton gins for the reason that the minimum monthly bill for users of electricity of the Defendant, Public Service Company, were generally based upon the connected horsepower and the connected horsepower load of the cotton gins was relatively high and therefore any monthly bill would have been a relatively large bill (in some cases more than $600.00 per month) and would have been incurred at a time in which said cotton gins incurred no revenue whatsoever.

3. During the time in which the said members of Plaintiff class were receiving electrical service from the Defendant, Public Service Company of Oklahoma, and on or about the 3rd day of December, 1974, said Defendant, Public Service Company filed with the Defendant, Oklahoma Corporation Commission, its application "that the Corporation Commission of the State of Oklahoma after appropriate investigation and hearing, as prescribed by its rules, authorize Applicant to adjust its rates to provide additional $20,150,000.00 in annual revenue *and to spread the increase equally throughout its rates* to permit a reasonable return on its equity capital and permit Applicant to earn a fair and adequate rate of return on the fair value of its plant property and other assets devoted to public utility services in the State of Oklahoma." (emphasis added) A true and correct copy of said application is attached hereto marked Exhibit "A" and made a part hereof. In summary, said application cited as a ground for its proposed increase in rates "increases in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities."

4. Thereafter, on or about the 9th day of December, 1974, the Defendant, Corporation Commission of the State of Oklahoma issued its Notice and Order Setting Cause for

Pre-Hearing and Hearing wherein in perinent part said Notice and Order provided as follows:

> "Notice is hereby given that the above-named Applicant has filed an Application alleging that its earnings from electric utilities service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property and other assets devoted to public utility service in Oklahoma."

Said Notice and Order Setting Cause did not state in any additional detail or any further manner exactly what relief and adjustment in rates was being sought and the source for this information was from the language in the Application itself. A true and correct copy of said Notice and Order Setting Cause for Pre-Hearing and Hearing is attached hereto and marked Exhibit "B" and made a part hereof.

Included in said Notice and Order was an order that "Applicant shall cause the above Notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application."

5. Thereafter, the Defendant, Public Service Company of Oklahoma caused to be mailed to various members of the class of Plaintiffs herein certain "flyers" and caused to be published certain advertisements in various newspapers representing that because of inflation, increase cost of labor, fuel, equipment, taxes, the rate increase was necessary and further that "each customer will pay a proportionate share of the increase." Copies of said "flyers" and advertisement hereto marked Exhibits "C-1", "C-2" and "C-3" and made a part hereof.

6. Thereafter, Pre-Hearing Conference was held on February 19, 1975 and Hearings were held by the Corporation Commission of the State of Oklahoma on March 19, 20 and 26, 1975. No further notice concerning these Hearings was ordered or given to anyone. Plaintiffs made no appearance, at any of the Hearings, believing that the Public Service Company's request for relief was limited to the request for a general rate increase, rather than a request for a complete "restructuring" of tariffs which would include the elimination of that special tariff applicable to cotton gins.

7. Thereafter, on the 15th day of April, 1975, the Corporation Commission of the State of Oklahoma entered certain Findings and Order, a copy of which said Findings and Order is attached hereto marked Exhibit "D" and made a part hereof. Included in said Findings is the following pertinent language:

> "This record reveals that Applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, *and thus the proposal to restructure into nine rates is absolutely necessary and clearly in the public interest.*"

8. Said Order of the Oklahoma Corporation Commission, authorized the Applicant, in said Cause, before the Commission to "restructure" and in effect abolish and abrogate the above referred to special tariff applicable to cotton gins. Said Findings and Order of the Defendant, Oklahoma Corporation Commission are void and invalid as to said Plaintiff class or classes and a writ of prohibition should be issued against the Corporation Commission of the State of Oklahoma from enforcing said Order and the tariffs filed thereunder and an injunction should be issued against Public Service Company of Oklahoma, enjoining said Defendant from charging rates based upon the void Order and tariffs for the following reasons:

a. Said Findings and Order was void in its entirety in that same was based and issued upon an Application, which Application of Public Service Company of Oklahoma misrepresented said Applicant's actual proposal, to-wit, said Application represented that Applicant was seeking a general rate increase and "to spread the increase equally throughout its rates" at "an increase of 12.5%." When the true and actual intent of Applicant, as provided in the Findings and Order of the Commission, was in fact, to eliminate and abrogate the various classes created by the then existing tariffs.

b. Said Findings and Order was void in its entirety in that same was based and issued upon inadequate and misleading representations provided in notices, advertisements and "flyers" published to customers of the said Applicant in that said Notices stated that "each customer will pay a proportionate share of the increase" and made no statement with respect to the proposal to "restructure" the rates and eliminate the various separate classes of users.

c. Said Findings and Order was entered by the Corporation Commission of the State of Oklahoma, in the absence of, furnishing to the members of the Plaintiff class the opportunity to be heard thereon as to the issue of the need to "restructure" said rates and eliminate said special classes.

d. Said Findings and Order was entered by Oklahoma Corporation Commission, in the absence of, giving to the members of Plaintiff class notice as required by due process of law and as provided in 5th and 14th Amendments of the Constitution of the United States of America.

e. Said Findings and Order was entered by the Oklahoma Corporation Commission, in the absence of, having provided members of Plaintiff class with notice

as required by Constitution Article 9, Section 18 of the State of Oklahoma.

TERRY SHIPLEY
119½ South Main Street
Noble, Oklahoma, 73068

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Petition for Writ of Prohibition and Injunction was served upon the following:

Rex Privett, Chairman of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Larry Derryberry, Attorney General of the
State of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Ed Overholser, Secretary of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Robert L. Lawrence, Service Agent
The Public Service Company of Oklahoma
2932 First National Tower
410 South Boston Avenue
Tulsa, Oklahoma, 74103

by placing same in the United States mail, postage prepaid on this 3rd day of October, 1975.

TERRY SHIPLEY

EXHIBIT "A"

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

FILED
DEC - 3 1974
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)	CAUSE NO. 25346

APPLICATION

Comes now Public Service Company of Oklahoma, a domestic corporation, hereinafter referred to as Applicant, and for its cause of action, alleges and states:

I.

1. That Applicant is a corporation created and organized by and under the laws of the State of Oklahoma duly authorized to conduct business therein, with its principal office at First National Tower, P.O. Box 201, Tulsa, Oklahoma 74102. That it is a public utility with plant, property and other assets dedicated to and for the genera-

tion, transmission, distribution and sale of electric energy within and throughout a large number of counties within Oklahoma.

2. That its present rates and charges were approved by the Corporation Commission of the State of Oklahoma in its Order No. 70384, entered on the 19th day of November, 1968.

II.

1. That since the date of said Order, Applicant has been faced with increases in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities. That all increases have been beyond the control of Applicant and have resulted in Applicant earning less than a reasonable return on the fair value of its plant, property and other assets devoted to public utility services in the State of Oklahoma.

2. Applicant has made a concentrated effort, by economizing in operation to combat and offset cost increases. However, the increased costs of goods, services and money have far exceeded . . .

3. That due to the foregoing, the Applicant is not earning a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Okahoma.

That for the year ending December 31, 1974, Applicant will earn a pro forma rate of return of less than 5¼% on its fair value public utility rate base of approximately $606,000,000. Without the rate adjustment herein requested, the rate of return will decrease to less than 4½% in 1975.

4. That the cost for fuel that is necessary to generate electricity to supply Applicant's customers is increasing,

and the fuel adjustment clause does not recover all of the increased cost.

5. That an additional $20,150,000 should be provided by an adjustment to Applicant's rates under the jurisdiction of this Commission which amount is an increase of 12.5%. $3,100,000 in additional revenue should be provided through a modification of the fuel cost adjustment clause for sales to the Grand River Dam Authority so that this fuel cost adjustment clause will be as nearly as possible on the same basis as applied to other customers, which modification has been requested by a filing with the Federal Power Commission. The total of $23,250,000 in additional annual revenue is needed to provide Applicant a reasonable rate of return on the fair value of its plant, property and other assets and to allow a reasonable return on its equity capital.

III.

Jurisdiction of the Commission in this proceeding is based on its authority to fix rates and charges found in 17 O.S. 1971, Section 151, 152, and the general regulatory power in Article IX, Section 18, of the Constitution of the State of Oklahoma and related sections, which have been extended to electric utilities.

IV.

WHEREFORE, Applicant prays:

That the Corporation Commission of the State of Oklahoma, after giving notice of hearing and after appropriate investigation and hearing as prescribed by its rules, authorize Applicant to adjust its rates to provide an additional $20,150,000 in annual revenue and to spread the increase equally throughout its rates to permit a reasonable return on its equity capital and permit Applicant to earn a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Oklahoma.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF OKLAHOMA

s/ By Robert L. Lawrence
Robert L. Lawrence

s/ Everett L. Cunningham
Its attorneys

First National Tower
P. O. Box 201
Tulsa, OK 74102
Phone: 918/583-3611

EXHIBIT "B"

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

FILED
JAN 16 1975
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT OF ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)))))))	CAUSE NO. 25346

NOTICE AND ORDER SETTING CAUSE FOR PRE-HEARING AND HEARING

NOTICE IS HEREBY GIVEN that the above-named Applicant has filed an Application alleging that its earnings

from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma.

NOTICE IS FURTHER GIVEN that a Notice and Order Setting this Cause was previously issued wherein the pre-trial hearing was scheduled for March 25, 1975, and hearing on the merits April 24, 1975. However, these previously scheduled hearing dates have been cancelled and changed to dates hereinafter stated.

IT IS THEREFORE ORDERED that this Cause be set for pre-hearing conference in the Commission's Courtroom, Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at 10:00 a.m., on the *19th* day of *February, 1975*. Applicant is directed to have copies of all basic exhibits and testimony that it will rely on in its Case-in-Chief filed and ready to furnish to interested parties at least 10 days prior to this hearing.

NOTICE IS FURTHER GIVEN that at the pre-hearing conference the Commission will consider and rule on motions, requests for information, and determine other procedural matters.

IT IS FURTHER ORDERED that this Cause be set for hearing on the merits before the Commission en banc in its Courtroom, Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at *10:00 a.m.*, on the *19th and 20th days of March, 1975*.

IT IS FURTHER ORDERED that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of

each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.

IT IS FURTHER ORDERED that after hearing, the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application.

All inquiries for information concerning this Application should be directed to Mr. Robert L. Lawrence, General Counsel, Public Service Company of Oklahoma, P. O. Box 201, Tulsa, Oklahoma 74102.

DONE AND PERFORMED this 16th day of January, 1975.

CORPORATION COMMISSION OF
OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

s/ Ray C. Jones
RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

EXHIBIT "C-1"

Yes, PS Has Applied For Higher Rates.

Our company has asked the Commission for an additional $20 million in annual revenue, to be applied to all customers. If the Commission approves our request, each customer will pay a proportionate share of the increase.

For retired people and welfare people and no job personnell how can we pay bills if they are higher? We can hardly pay the ones we have now.

Sharie G. Lewis

EXHIBIT "C-2"

Why Does PS Need A Rate Increase?

Inflation is the main reason. Our costs for labor, fuel, equipment and taxes have all gone up, as have the costs of operating your home or business.

We realize that the prospect of higher electric bills won't be welcomed by customers already troubled by inflation. But, of course, how much your bill goes up depends on your wise use of electricity. Compared to the overall rise in living costs, we think you'll find that even with a rate increase, electric service is still a bargain.

yes! PS

We're your electric company.

Public Service Company of Oklahoma

EXHIBIT "C-3"

Yes, PS has applied for higher rates.

Our company has asked the Oklahoma Corporation Commission for an additional $20 million in annual revenue, to be applied to all customers. If the Commission approves our request, each customer will pay a proportionate share of the increase.

Inflation? Yes. Our costs for labor, fuel, equipment and taxes have all gone up, as have the costs of operating your home or business.

We realize that the prospect of higher electric bills won't be welcomed by customers already troubled by inflation. But, of course, how much your bill goes up depends on your wise use of electricity. Compared to the overall rise in living costs, we think you'll find that even with a rate increase, electric service is still a bargain.

YES! PS

We're your electric company.

PUBLIC SERVICE COMPANY OF OKLAHOMA

EXHIBIT "D"

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC SERVICE IN THE STATE OF OKLAHOMA	) CAUSE NO. 25346	
	) ORDER NO. 112286	

BY THE COMMISSION:

Robert Lawrence and Everett Cunningham, for the Applicant

Andrew Dalton for the Sierra Club of Oklahoma

Calvin Hendrickson, for N.E.C.A.

Jack A. Swidensky, Lee W. Cook, and David Wick, Jr., for the Commission

PRE-HEARING CONFERENCE: February 19, 1975.

HEARINGS: March 19, 20 and 26, 1975.

FINDINGS

Applicant, Public Service Company of Oklahoma, is a domestic corporation, a public utility with plant, property and other assets dedicated to, and used for the generation, transmission, distribution and sale of electric energy within and throughout a number of counties in Oklahoma, which currently serves 373,039 customers. It is one of four operating electric companies comprising Central and Southwest Corp., an electric holding company doing business in Oklahoma, Arkansas, Texas and northwestern Louisiana. Applicant accounts for approximately 31% of the consolidated holding company's revenue. Applicant's present rates and

charges were approved by this Commission in its Order No. 70384, entered November 19, 1968. In its Application, the Company proposed and sought to re-structure its tariffs and adjust its rates to provide an additional $23,500,000 in annual revenue using a test year ending December 31, 1974. However, $3,100,000 involves non-jurisdictional sales under the Federal Power Commission's jurisdiction, involving the Markham Ferry co-ordinating agreement (G.R.D.A.), dated August 5, 1957, which increase the Applicant requested be made effective January 1, 1975. Thus, the jurisdictional request proposed herein is for $20,150,000.

This proceeding was duly set for prehearing conference and public hearing, requiring that notice be given by mailing a copy of the notice to the Chief Executive Officer in each city or town in which the Applicant furnishes electric service and by publishing once a week for two consecutive weeks in a newspaper of general circulation in the county seat city or town of each county in which the Applicant has customers that will be affected by the Application.

During this hearing, a total of 100 exhibits were presented and received from the Applicant, protestants, intervenors and staff of this Commission. The Applicant introduced testimony showing revenue and expenses for the test year herein ending December 31, 1974, with normalization. Such normalization was made by making adjustments both in revenue and expenses to reflect weather conditions, non-firm off-system sales, etc., which reduced annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expense of $2,709,000, plus adjusted income taxes resulted in $29,089,000 in utility operating income for a 6.10% return on original cost rate base. Adjustments by the Commission staff to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the Commission staff adjusted original cost rate base of 7.32%. Total weighted

cost of capital was shown to be 8.5%, including a proposed 13% return on common equity.

The Applicant presented exhibits showing original cost and fair value rate base and exhibits showing rate of return on fair value and on original cost rate base. However, the Company during the hearing proposed a rate of return on original book cost less accrued depreciation and did not ask or propose trended costs, replacement costs, or fair value. The testimony of the Company indicated that it sought rate relief based upon a return of 8.5% on its original cost rate base.

RATE BASE

In this case, the Applicant presented testimony as to plant, revenue and expenses for a test period ending December 31, 1974. According to the Applicant's testimony, its plant and property devoted to utility service in the State of Oklahoma on a normalized or pro forma original cost basis, amounted to $447,238,000. However, this includes net plant in service, construction work in progress, plus an allowance for material and supplies and cash working capital. The Commission staff used an end of period rate base. On an original cost basis, the staff found the rate base to be $415,661.000 at the end of the test period. The main difference between the two original cost rate bases being the treatment accorded construction work in progress, cash working capital, material and supplies and accumulated deferred Federal Income Tax. The staff audit used average, beginning and ending year for materials and supplies and, we find and make adjustments upward to allow year end figures.

Applicant introduced evidence of growing acceptance for inclusion of "varying amounts" of construction work in progress with benefits both to the consumer and the Applicant. The Applicant and the Commission staff witness agreed that nuclear fuel in process of refinement should be

treated as a prepayment for material and supplies under working capital, and not as a part of work in progress. However, the Commission finds and determines that any expense or investment for nuclear energy facility should be excluded at this time, in view of the fact that no approval or authorization has been determined by the Nuclear Regulatory Commission. Work in progress is a subject matter which should be currently considered by the Commission, but we cannot accept the Applicant's full proposal herein.

Construction work in progress which is reasonable in amount and contemplated to be in service within a reasonable time after the end of the test year may properly be included in a utility's rate base on which it is entitled to earn a rate of return. There should be no allowance for funds used during construction accrued on Construction Work in Progress to the extent that Construction Work in Progress is included in rate base subject to the jurisdiction of the Commission upon which revenues are being collected. If such charges do not cease, the utility would obtain a double recovery on such charges, which can not and should not be approved.

Because a public utility must engineer and construct plant in advance of actual customer needs and cannot wait until those needs actually occur, the utility cannot be denied a reasonable return thereon unless it can be shown that the investment was improvident or imprudent. Neither the Commission nor the Applicant can operate in an abstract vacuum; and reasonable available cash flow must be provided. These items represent funds supplied by investors and are funds on which investors are entitled to an opportunity to earn a rate of return found fair and reasonable. The Commission feels that this is in the public interest and therefore finds that construction projects in progress which will be on line or in use no later than December 31, 1975, should be and are thus allowed in the current rate base. Consistent with the three year revenue increase treatment

given, the Commission allows rate base consideration of work in progress as found herein, to be $17,500,000 in 1975, and an additional $5,000,000 in 1976, an additional $5,000,000 in 1977, for a total of $27,500,000 thereafter.

Therefore, the Commission directs that the allowance for funds used on work in progress, in excess of amounts allowed herein be capitalized, for projects which exceed $5,000 and require more than thirty days for completion. The rate use for such computations shall be established at the beginning of each year and shall not exceed the Applicant's current cost of capital at that time. This computation shall be made monthly, and the amount so determined recorded on the Applicant's books by an increase to the work in progress account and an increase to other non-operating income. The effect of this procedure is to reflect a non-cash entry resulting in non-cash earnings on the current income statement and the deferral of realization of cash until the time the work in progress, including the allowance for funds used during construction, is placed in service and depreciation charges against income commerce.

Therefore, by the adjustments made herein, we find the adjusted rate base for 1975 to be $438,603,000; for 1976: $443,603,000; and for 1977: $448,603,000.

OPERATING RESULTS DURING THE TEST PERIOD, AS NORMALIZED

The Applicant introduced testimony showing revenue and expenses for the test period ending December 31, 1974, with normalization. These normalizations consist of making adjustments, both as to revenue and expenses to reflect what the revenue and expenses would have been had the conditions as of December 31, 1974 levels been prevalent during the entire twelve months, plus certain adjustments that have occurred or reasonably can be anticipated to occur outside the test period. These normalizing adjustments included an adjustment for abnormal weather con-

ditions and non-firm off-system sales which reduced the annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expenses of $2,709,000 plus adjusted income taxes resulted in $29,089,000 in utility operating income, for a 6.10% return on original cost rate base. Staff adjustments to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the staff adjusted original cost rate base of 7.32%.

The Applicant decreased revenue by $9,559,000 for abnormal non-firm off-system sales and decreased expenses by $1,709,000 for fuel to generate power for the non-firm off-system sales. The Applicant cannot conclusively prove that the power will not be sold, nor can the staff prove that it will be sold. However, the plant capacity is there, the need for KHW's is here, the company need only try to sell it. The question is, should the ratepayers or the stockholders have this burden and responsibility? The Commission cannot totally allow the adjustment as proposed. The staff adjusted fuel cost (and thus, working capital allowance) and labor cost, general and miscellaneous taxes and these adjustments are approved. The Applicant proposed in its municipal street lighting rate the 40% discount as now existing in current contracts. The Commission does not disapprove this, but for rate making purposes, this subject, in the amount of $113,800 should be treated as earned revenue so as to reduce revenue deficiency accordingly.

The Commission finds that the Applicant has exercised prudent operation by enacting cost reduction programs that have significantly reduced operating expenses. Promotional practices have been curtailed and advertising has been limited. Contributions are currently taken "below the line." Advertising expenses in the amount of $363,411 for consumer education and conservation of energy, as allowed by the Supreme Court, are found to be fair and reasonable and are allowed as a proper expense in this Cause.

The Applicant's use and treatment of their employee discount for residential service is approved. This record reflects a 5-year trend increase for uncollected bills and for the test period, $390,210. However, the Company wrote off $535,290 due to having to add to their reserve. This amount is allowed as expense but the company is directed to review and police this area due to our general rules allowing them to require a two months deposit, a 1½% late payment charge and a reconnection charge.

Consistent with our finding herein and the company's activity in the area of promotional practices, the company should advise this Commission's Public Utility Engineer, consistent with our Order No. 87994 and delete those practices or allowances not presently in effect. Likewise, this record reflects that the Applicant has one town served under a 3% franchise tax due to a previous purchase. This franchise payment should be processed, charged and paid consistent with Rule #54 of our Order No. 101932 and the excess over 2% should be separately stated on the face of the bill and charged consumers pro rata within the municipality.

The Commission finds the Applicant's proposed 13% return on common equity at December 31, 1974 levels is fair and reasonable. Consistent with our adjustments and findings made herein, we determine a gross revenue deficiency for 1975 of $13,927,000.00; for 1976, an additional $863,000, and for 1977, an additional $863,000.

RATES AND RE-STRUCTURING

This record reveals that Applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, and thus the proposal to re-structure into nine rates is absolutely necessary and clearly in the public interest. However, this re-structuring and the harsh immediate economic impact on customers has

bothered and concerned the Commission during these entire proceedings.

First, the Commission finds that Applicant's proposals in their submitted tariffs, concerning their fuel cost and heat rate factors are not in compliance with current general orders and shall not be accepted for filing and approval by the Commission's Public Utility Engineer until they are consistent with Rule No. 55, Order No. 101932 and so approved by that department. Under Applicant's proposal, fuel cost based at 50 cents per MCF, at a heat rate factor of their proposed 11,500 KWH would cause the cost of fuel to be 5.75 mills per KWH; which, in fact, is higher than Applicant's cost of fuel under the accepted formula in Order No. 101932. Also, the tax adjustment clause in each filed tariff shall be amended to delete the language, "or contributions or payments in lieu thereof, or other exactions", and shall add the following language at the end of that sentence: "when voted by the people at a regularly called franchise election."

The Sierra Club of Oklahoma presented the testimony of Dr. Eugene P. Coyle, the thrust of which covered the efficiency-incentive function of rate design, incremental cost pricing, tail block rates reflecting incremental cost and not priced at average or fully-distributed costs, raising the lower block rates and decreasing the first few steps, restricting rates below cost to industry to attract more industry and then making up these low rates to industry by charging the residential customers enough to subsidize the industrial user, contesting the traditional declining price with increasing use and the rate design and schedules as proposed remaining promotional, with both capacity and energy charges declining as the customer uses more power or energy.

Curiously, this record reflects that during the test period, residential customers paid 35.8% of the company's revenue, commercial paid 22.8%, industrial 14.9%, and

public street lighting, public authorities and sales for re-sale accounted for the balance of revenue. For MWH's sold, residential customers accounted for 21.8%, commercial for 16.7%, industrial for 19.8% and public street lighting, public authorities and sales for re-sale accounted for the balance. Considering the total number of customers: residential accounted for 88.3%, commercial for 10.4%, industrial for 1% and public street and highway lighting and sales to public authorities (not for re-sale) accounted for the balance. All of these factors as found and reviewed herein must be considered. However, the "past" fundamental truths such as "growth is always good" and "electricity is always cheap" have been shattered.

The impact of the proposed re-structured rates varies substantially among individual customers because of the vast difference in prices charged for similar services on the numerous pre-existing rates. The low impact rate proposal considered by the Applicant at the request of the Commission during the hearing represents substantial mitigation of the aforementioned impact on some individual customers. It appears that such mitigation is in the public interest. The plan for a gradual implementation of the proposed rate structure, as requested by this Commission, represents an appropriate vehicle for equalization of charges for similar service without requiring immediate undue economic impact. While such a plan may constitute an administrative inconvenience to the Applicant, it nevertheless will provide for achievement of equity among customers in an orderly fashion. Such a transition from traditional promotional pricing practices to a posture of similar charges for similar service is in the public interest.

The Applicant is thus directed to re-structure its tariffs under the "low impact proposal" as requested by the Commission on this record, such rates being closed to new customers and the same shall be cancelled and terminated at the end of the billing month of May, 1976 and 1977, as

provided herein. Tariffs shall be re-structured, considering the additional revenues granted herein and shall be spread over the 3-year period as herein provided. These tariffs shall be implemented and billed after being filed with and approved by the public utility engineer of this Commission, consistent with our findings and order herein.

From this record the Commission concludes that an appropriate rate design should reflect and consider long-run costs to each classification of customer, conserve energy resources, promote economic efficiencies, ease of administration and easier understanding by customers. Demands for increased capacity of generation and transmission facilities and the demands for large amounts of fuel generated by heavy use customers are the principal factors behind the Applicant's needs for increased revenue. This can be accomplished by placing a heavier burden on larger residential users than that placed on the small and medium use residential customers, and also a heavier burden on large commercial and industrial users. This is not accomplished in this Order due to the immediate impact, but we have taken a step in the right direction and will be closer to the objective in 1977.

ORDER

IT IS THEREFORE ORDERED AND DIRECTED:

1. Applicant shall file tariffs designed to recover the revenue deficiency in compliance with the findings made herein.

2. Upon the filing and approval of such tariffs, all current tariffs, rates, riders and special contracts of the Applicant shall be vacated and cancelled.

3. The Applicant is directed to implement the rates herein authorized to be effective on the first billing, thirty (30) days from the date of this Order. It is recognized that all customers are not billed on the same date because of

being billed on different monthly billing cylcles, therefore the Applicant shall not prorate billing between the former and new rate schedules.

4. In order to monitor and supervise the increases granted herein, the Applicant is directed to file monthly operating statements or reports with the Commission for a twelve (12) month period.

DONE AND PERFORMED this 15th day of April, 1975.

CORPORATION COMMISSION OF OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

EXHIBIT "E"

EXHIBIT "E"

PUBLIC SERVICE COMPANY OF OKLAHOMA
OKLA. CORP. COMM.
JUL 18 1974

2nd Revised Sheet No.
Cancelling 1st Revised Sheet No.
Page 1 of 2

GAS, ELECTRIC & WATER — COTTON GIN — SERVICE

DEPARTMENT

COMPANY NUMBER: C 2

RATE CODE NUMBER: 962

APPLICABLE TO:

Allen	Hanna	Indianola
Canadian	Henryetta	Keota
Clarita	Hitchita	McAlester
Coalgate	Hugo	Okemah

This schedule is available for service to all-electric cotton gins receiving service at the Company's available primary distribution voltage. Incidental lighting up to 10% of the connected load may be included in this service. Service will be furnished under the Company's Rules, Regulations and Conditions of Service on file with the Corporation Commission of Oklahoma.

RATE: 6.02¢ net per kilowatthour for the first 150 kilowatthours used per month
3.53¢ net per kilowatthour for the next 150 kilowatthours used per month
3.02¢ net per kilowatthour for all additional use

MINIMUM MONTHLY BILL:

$1.00 net for the first horsepower, plus
0.50 net for each additional horsepower, or fraction thereof, of the total rated capacity of motors permanently connected.

The minimum monthly bill shall apply each month unless the customer has not used electric service during the preceding period between June 15 and September 15, in which instance the minimum monthly bill shall apply only during the months that electric service is used.

TERMS OF PAYMENT:

Payment is due within ten (10) days of the date of mailing the bill. The due date will be shown on all bills. A late payment charge will be assessed for bills not paid by the due date. The late payment charge shall be computed at 1-1/2 percent on the amount past due per billing period.

FOSSIL FUEL COST ADJUSTMENT:

The net energy charge will be increased or decreased when the average fuel cost per million BTU delivered to the fuel utilization equipment of the electric generating units of the Company during the second month preceding the current billing period is below or in excess of $0.18 per million BTU. Such adjustment shall be made in accordance with the following formula:

Issued (Month Day Year) Effective with all meter readings on and after 7 (Month) 18 (Day) 1974 (Year)

Rates Authorized by 104932 (Order No.) (A.E. No.) 249863 (Cause No.) (Date of Letter)

Issued by R. O. NEWMAN (Name of Officer) PRESIDENT (Title) PUBLIC SERVICE BUILDING TULSA, OKLAHOMA (Address of Officer)

PUBLIC SERVICE COMPANY OF OKLAHOMA

FILED
OKLA. CORP. COMM.

JUL 16 1974

EXHIBIT "E"
2nd Revised Sheet No.
Cancelling 1st Revised Sheet No. Page 2 of 2

COTTON GIN SERVICE

GAS, ELECTRIC & WATER DEPARTMENT

COMPANY NUMBER: C 2

RATE CODE NUMBER: 962

$F.A. = \left(A \times \frac{P - .18}{10^6} \times C \times \frac{1}{1 - D}\right)$

Where: F.A. = Fuel cost adjustment per metered KWH expressed in dollars per KWH.

A = The weighted average BTU/KWH for net generation from the Company's thermal plants during the second calendar month preceding the end of the billing period for which KWH usage is billed.

P = The average cost of fuel delivered to the Company's electric generating units in the second calendar month preceding the end of the billing period. Any credits, refunds, or allowances on previously purchased fuel received by the Company from any source shall be deducted in the computation of "P".

C = The ratio, expressed decimally, of the total net generation from all the Company's thermal plants during the second calendar month preceding the end of the billing period for which KWH usage is billed to the total net generation from all the Company's generating plants.

D = A loss factor, which is the ratio, expressed decimally, of KWH losses to net system KWH input (total system input less off-system sales) for the year ending December 31st preceding. This ratio shall be based on information as reported by the Company to the Federal Power Commission in its Annual Report Form No. 1 and upon a detailed report of off-system sales to the Oklahoma Corporation Commission. This ratio will be used for twelve months and shall change as of April 1st of each year.

Issued (Month) (Day) (Year) Effective with all meter readings on and after 7 (Month) 18 (Day) 1974 (Year)

Rates Authorized by 104932 (Order No.) 24963 (Cause No.) (A.E. No.) (Date of Letter)

Issued by R. O. NEWMAN (Name of Officer) PRESIDENT (Title) PUBLIC SERVICE BUILDING (Address of Officer) TULSA, OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA

OKLA. CORP. COMM.

EXHIBIT "E"
2nd Revised Sheet No.
Cancelling 1st Revised Sheet No. Page 1 of 2

JUL 16 1974

COTTON GIN SERVICE

GAS, ELECTRIC & WATER DEPARTMENT

COMPANY NUMBER: C 61

RATE CODE NUMBER: 965

APPLICABLE TO: All Towns and Communities served by the Company in the Southwestern Division for electric service to "all-electric" cotton gins receiving service from the Company's available distribution systems.

Service will be furnished under the Company's Rules, Regulations and Conditions of Service on file with the Corporation Commission of Oklahoma.

RATE: 3.02¢ per kilowatthour for all kilowatthours used per month.

TERMS OF PAYMENT:

Payment is due within ten (10) days of the date of mailing the bill. The due date will be shown on all bills. A late payment charge will be assessed for bills not paid by the due date. The late payment charge shall be computed at 1-1/2 percent on the amount past due per billing period.

FOSSIL FUEL COST ADJUSTMENT:

The net energy charge will be increased or decreased when the average fuel cost per million BTU delivered to the fuel utilization equipment of the electric generating units of the Company during the second month preceding the current billing period is below or in excess of $0.18 per million BTU. Such adjustment shall be made in accordance with the following formula:

$F.A. = \left(A \times \frac{P - .18}{10^6} \times C \times \frac{1}{1 - D}\right)$

Where: F.A. = Fuel cost adjustment per metered KWH expressed in dollars per KWH.

A = The weighted average BTU/KWH for net generation from the Company's thermal plants during the second calendar month preceding the end of the billing period for which KWH

Issued (Month) (Day) (Year) Effective with all meter readings on and after 7 (Month) 18 (Day) 1974 (Year)

Rates Authorized by 104932 (Order No.) 24963 (Cause No.) (A.E. No.) (Date of Letter)

Issued by R. O. NEWMAN (Name of Officer) PRESIDENT (Title) PUBLIC SERVICE BUILDING (Address of Officer) TULSA, OKLAHOMA

[APPENDIX]

PUBLIC SERVICE COMPANY OF OKLAHOMA

FILED
OKLA. CORP. COMM.
JUL 10 1974

EXHIBIT "E"
2nd Revised Sheet No.
Cancelling 1st Revised Sheet No.
Page 2 of 2

COTTON GIN SERVICE
COMPANY NUMBER: C 61
RATE CODE NUMBER: 965

GAS, ELECTRIC & WATER DEPARTMENT

usage is billed..

P = The average cost of fuel delivered to the Company's electric generating units in the second calendar month preceding the end of the billing period. Any credits, refunds, or allowances on previously purchased fuel received by the Company from any source shall be deducted in the computation of "P"

C = The ratio, expressed decimally, of the total net generation from all the Company's thermal plants during the second calendar month preceding the end of the billing period for which KWH usage is billed to the total net generation from all the Company's generating plants.

D = A loss factor, which is the ratio, expressed deciamlly, of KWH losses to net system KWH input (total system input less off-system sales) for the year ending December 31st preceding. This ratio shall be based on information as reported by the Company to the Federal Power Commission in its Annual Report Form No. 1 and upon a detailed report of off-system sales to the Oklahoma Corporation Commission. This ratio will be used for twelve months and shall change as of April 1st of each year.

Issued (Month Day Year) Effective with all meter readings on and after 7 (Month) 18 (Day) 1974 (Year).

Rates Authorized by 104932 (Order No.) (J.S. No.) 24963 (Cause No.) (Date of Letter)

Issued by R. O. NEWMAN (Name of Officer) PRESIDENT (Title) PUBLIC SERVICE BUILDING (Address of Officer) TULSA, OKLAHOMA

APPENDIX C

TRANSCRIPT OF TESTIMONY
PRE-TRIAL HEARING, FEBRUARY 19, 1975

Pages 11-12:

"MR. SWIDENSKY: Well, we are making headway, Mr. Chairman. Second area, and I don't ask for an exhibit here but to reconcile and find out where we are at the date of hearing. I am talking about the multiplicity of rates, Mr. Lawrence, all classifications and I am talking about all special contracts whether filed assigned tariff or not, my question, what is the company's intent in regard to the proposal you are making here and as I understand it cuts out all of those and wind up with four rates. Am I properly . . .

"MR. CARPENTER: That's correct except there are instances where the regular rate will not fit that instance when that occurs, when we come across it, we will present to the Commission this special contract for their approval."

Page 38:

"MR. SWIDENSKY: Mr. Chairman, my two attorney's let me forget a major item that I want to report. If you will go to Exhibit No. 52 all parties, consistent with looking at the other residential exhibit that we looked at before. I am concerned Mr. Chairman, with the rate restructuring considering No. 36 and the tariff proposals made by the company, and of course, this is what this hearing is all about and Mr. Lawrence and I both recognize the tariffs in Exhibit 52, 3, 4, and 5 are based upon a presumption as they would have to be, that the Commission accepts one hundred percent of the company's proposal. . . ."

HEARING, MARCH 19, 1975

Pages 335-336:

Q. Will you pick up Exhibit 87, the advertising flyer that Mr. Carpenter, said was inserted to each of the customers. Will you read to the Commissioners the lan-

guage on the face of that which advises the customers of the comparable charges of all customers, just read that language?

A. I'm not sure I found it. Our company has ask the Commission for an additional $20,000,000 in annual revenues to be applied to all customers. If the Commission approves our request each customer will pay a proportionate share of the increase. Is that responsive?

Q. According to proportionate share, but has the company done anything, that's the language I'm referring to, but has the company done anything advising it's customers of the disparity and the impact of structure on some customers, be it residential, commercial or industrial?

A. I don't know.

Q. Does anybody in your company know?

A. Well, I say we have done something. We have answered some individual requests. I suspect that is the reason for Mr. Hendrick's presence here.

Q. Requests in regard to that customers billing and charges?

A. Yes, sir.

Q. So that was likewise true of Mr. Graham's request, wasn't it?

A. Yes, sir.

Q. I'll get to him later, the point is, is it true that the customers will be charged proportional increase, their proportional increase? What I'm trying to equate is the 30% reduction for some residential, and a 56% increase to other residential, is that even proportional?

A. Well, the language here is proportionate, rather than proportional.

Q. What did you mean when you said that?

A. I don't know. I didn't make it up.

Q. What did the company mean? Your representing your company here?

A. Yes, sir.

Q. What did your company mean?

A. I think they meant that the increase would be distributed to all customers. I don't think it was our intent to imply that every customer would get the same percent increase.

Q. Because they will not, will they?

A. No, sir.

Q. And again no matter what it's done, there is no way you can do that?

A. That's correct.

APPENDIX D

UNITED STATES CONSTITUTION
AMENDMENT V

Criminal Actions—Provisions Concerning—Due Process of Law and Just Compensation Clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION
ARTICLE I, SECTION 10(1)

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

APPENDIX E

OKLAHOMA CONSTITUTION
ARTICLE IX, SECTION 18

Powers and Duties—Notice Before Taking Action—Process for Witnesses—Authority of Legislature—Municipal Powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary

to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates,

charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

OKLAHOMA CONSTITUTION
ARTICLE IX, SECTION 20

Appeals to Supreme Court—Other Courts to Have No Jurisdiction—Mandamus and Prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of ap-

peals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusion of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from

the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

OKLAHOMA SUPREME COURT RULES

Rule 38. Evidence—Reference. On any controverted question of fact, this Court will refer the cause to a referee for the purpose of taking testimony or hear the evidence, as it shall determine.

OKLAHOMA CORPORATION COMMISSION RULES OF PRACTICE — RULE 10

COMMENCEMENT OF A PROCEEDING:

(a) FORM: Every proceeding shall be commenced by an initial pleading, which shall be either (1) an application, (2) a complaint, or (3) an order of the Commission commencing a proceeding. An application shall include any request for authority, approval, determination, permission or other Commission action or relief whether or not directed against a named respondent. A complaint shall include every form of request for enforcement of an order, rule or regulation of the Commission, or for relief against a named respondent based upon an alleged violation of law or of a rule, regulation or order of the Commission.

(b) CAPTION: Every initial pleading shall be headed by a caption, which shall contain (1) the heading, "Before the Corporation Commission of Oklahoma"; (2) the caption of the cause, being a brief statement of the order sought; 3) the docket and cause number, and (4) the title of the pleading.

(c) BODY: The body of the initial pleading shall consist of four numbered paragraphs, as follows:

(1) *Parties:* The parties shall be identified, including (a) the name and address of the Applicant or Complainant and the nature of his interest in the sub-

ject matter of the proceeding, and (b) the name and address of each party (if any) named as Respondent.

(2) *Allegation of Facts:* The allegations of fact stated in the form of ultimate facts, without unnecessary detail, upon which the right to relief is based. The allegations will be stated in numbered sub-paragraphs as necessary for clarity.

(3) *Legal Authority:* Citations of statutes, rules, orders and decided cases authorizing the relief sought; including, in the case of a complaint, the laws, rules, regulations or orders alleged to have been violated. Statutes shall be cited by title and section; rules and orders of the Commission shall be cited by number and decided cases shall be cited by citation to official reports. Quotations from legal authorities shall not be required.

(4) *Relief Sought:* A brief statement of the provisions of the order, authority or other relief sought. An application relating to oil and gas conservation shall seek only one type of relief. Formal prayer for relief shall not be required.

(d) SUBSCRIPTION: The initial pleading shall be signed by the party or an authorized agent of the party, or by the attorney for the party, and shall set out the address and telephone number of the person so signing it. Verification of the pleading shall not be required for an application; but verification shall be required for a complaint, and for application for motor carrier authority.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 11

NOTICE OF HEARING:

(a) The party commencing a proceeding shall file with the initial pleading an Order Setting Cause for Hearing, and a Notice of Hearing, stating the date designated by the

Secretary upon which the cause is set for hearing before the Commission, or in the alternative, an Order Referring and Setting Cause for Hearing, and Notice of Hearing, stating the date designated by the Secretary upon which the cause is set for hearing before a hearing officer. A copy of both the Notice and the Application or Complaint shall be served upon each named respondent, and a copy of the Notice shall be served upon each other party required by these rules to be served. The Notice also shall be published as provided in these rules.

(b) Notice of hearing an application relating to conservation of oil and gas shall be signed by at least a majority of the members of the Commission, and shall specify (1) the time and place of hearing; (2) briefly the general nature of the order, rule, regulation or other relief sought; and (3) the names or description of all common sources of supply affected by the order sought, or that the entire state would be affected.

(c) The Order and Notice shall be combined and shall substantially conform to the following form:

BEFORE THE CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLI-)
CATION OF) CAUSE NO.
FOR AN ORDER)
)

NOTICE AND ORDER (REFERRING AND)
SETTING CAUSE FOR HEARING

STATE OF OKLAHOMA TO: (Name any party to whom resulting order may be specifically directed) and all interested parties:

NOTICE IS HEREBY GIVEN that the above named applicant has filed an application (set out the nature of the application and the relief sought).

whom allied in interest. In all other cases, the presiding officer shall designate the order of proof.

(g) EXAMINATION OF WITNESSES: Every witness shall be examined and cross-examined orally and under oath by not more than one attorney for each party. The presiding officer shall designate the order of examination and may limit the scope of examination and cross-examination.

(h) ADVERSE PARTY: A party may call an adverse party or an officer or employee of an adverse party, in which case the witness may be impeached and otherwise cross-examined.

(i) OFF THE RECORD: All testimony will be taken on the record unless the presiding officer designates otherwise.

(j) PREPARED TESTIMONY: Written testimony of a witness in form of questions and answers, or a narrative statement may be received in lieu of direct examination upon authentication by the witness under oath. The witness shall be subject to cross-examination. A written or oral statement by or a communication from any person, or a statement or resolution of a political subdivision, trade association, civic organization or other organization may be received without cross-examination, but will be considered only as argument, and not as proof of any recitation of facts contained therein.

(k) DOCUMENTS:

1. A photographic copy of an instrument which is on file as part of the official records of the Corporation Commission will be received without further authentication.
2. A photographic copy of a public record certified by the official custodian thereof will be received without further authentication. A written statement by such custodian of records that no record or entry of described character is found in his records shall be received as proof of absence of such record.
3. A photographic copy of a document may be substituted for the original at the time the original is offered in evidence.
4. A document may not be incorporated in the record by reference except by permission of the presiding officer. Any document so received must be precisely identified.
5. The Commission may require that documents such as rate compilations, statistical or technical data and tabulated material be filed at a designated time prior to the hearing.
6. The Commission or hearing officer may require that additional copies of exhibits be furnished for use by the Commission, staff counsel and other parties.
7. When evidence is offered, which is contained in a book or document containing material not offered, the party offering the same shall extract or clearly identify the portion offered.
8. The Commission or presiding officer may permit a party to offer a document as part of the record within a designated time, not to exceed ten days after conclusion of the hearing.

(l) SUMMARY EXHIBITS: An exhibit, consisting of a compilation or summary of evidence, records, data, statistics, or other similar information, may be received in evidence in addition to or in lieu of the evidence summarized, provided (1) the evidence summarized has been admitted in evidence, or is admissible, and (2) if the evidence summarized has not been admitted, the party offering

IT IS ORDERED that this cause be referred to a Trial Examiner (or Referee) for hearing, taking of evidence, and report to the Commission. (Omit this paragraph if reference is not to be made).

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that this cause will be heard before the Commission (a trial examiner) (a referee) at the Corporation Commission, Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma at ..... o'clock A.M., the ..... day of ....., 19 ..., and that this notice be published as required by law and the rules of this Commission.

AND NOTICE IS FURTHER GIVEN that after hearing the Commission will, regardless of the relief requested in the application, issue such orders and grant such relief as it deems proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the application.

DONE AND PERFORMED this ..... day of ....., 19 ....

CORPORATION COMMISSION OF OKLAHOMA

.....
Chairman

.....
Vice Chairman

.....
Commissioner

ATTEST:

.....
Secretary

OKLAHOMA CORPORATION COMMISSION RULES OF PRACTICE — RULE 12

NOTICE OF PUBLICATION: When a proceeding is filed, the applicant shall cause the notice of hearing prescribed in Rule 11 above to be published in one or more newspapers of general circulation in Oklahoma, on dates and for periods as required by law or these rules, or as the Commission shall order. Publication shall be at the expense of the party commencing the proceeding, and shall be made in a newspaper which has met the statutory requirements for publication of legal notices. Written proof of publication shall be filed prior to hearing.

OKLAHOMA CORPORATION COMMISSION RULES OF PRACTICE — RULE 12(e)

(e) Utility Rates and Certificates: Notice of an application for certificates of convenience and necessity to construct and operate telephone lines shall be given and published as provided in 17 O.S. 1961 § 132. Notice of an application for extension of telephone service shall be given and published as provided in 17 O.S. 1961, § 136. Notice of filing of an application for approval of any schedule, rate, charge, classification, rule or regulation which will directly or indirectly alter charges made for service performed, shall be published once each week for two consecutive weeks in a newspaper published in each county in which are located utility customers affected thereby, unless the Commission directs otherwise. Notice of any other application pursuant to the jurisdiction of the Commission over utilities, transportation, and public service corporations shall be published as the Commission shall direct.

the summary exhibit has made the evidence summarized available for inspection by all other parties of record, or the information is published in a generally recognized publication which is available to the parties. It shall be the responsibility of a party offering a summary exhibit to comply with this rule in advance of the hearing; and failure to make the evidence summarized available for inspection shall be grounds for refusal to admit the exhibit.

(m) CLOSING THE RECORD: The record shall be closed when all interested parties have had an opportunity to be heard and to present evidence, and the Commission or other presiding officer announces that the record of testimony and exhibits is closed. Unless a decision is then announced, the matter will be taken under advisement for later decision.

(n) BRIEFS: The Commission or hearing officer may require or allow the filing of briefs by the parties, and may designate the order and time for filing briefs and reply briefs.

(o) RE-OPENING THE RECORD: Any party may file and serve on all other parties by regular mail, a motion to re-open the record for further hearing or to offer additional evidence. The Commission at any time prior to final Order in the proceeding, may upon such motion or on its own motion, order the record to be re-opened for such purposes and on such terms as may be just.

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

Rex Privett, Chairman of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Larry Derryberry, Attorney General
of the State of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Ed Overholser, Secretary of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Robert L. Lawrence, General Counsel
The Public Service Company of Oklahoma
2932 First National Tower
410 South Boston Avenue
Tulsa, Oklahoma 74103

R. Dobie Langenkamp, Attorney
Doerner, Stuart, Saunders, Daniel & Langenkamp
1200 Atlas Life Building
Tulsa, Oklahoma 74103
Attorney for The Public Service Company of Oklahoma

all parties required to be served, by mailing such true and correct copies, postage prepaid, this ..... day of June, 1977.

.....
TERRY SHIPLEY

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 13

RESPONSE TO INITIAL PLEADING:

(a) FORM: Every pleading in opposition to an initial pleading, whether filed by a party named a respondent therein, by a protestant, or by any other party, shall be styled a "Response" and shall contain:

(b) CAPTION: As in the initial pleading

(c) BODY: The response shall contain four numbered paragraphs, as follows:

1. *Parties:* The respondent shall be identified, including (a) name and address, and (b) nature of his interest in the subject matter of the proceeding.

2. *Allegations of Fact:* Response to the allegations of fact shall include: (a) Admissions of all allegations of fact admitted by the Respondent; (b) Specific denial of any allegations of fact Respondent alleges and expects to prove to be untrue, and (c) Allegations of all other facts necessary or appropriate to support Respondent's position. Failure to deny specifically any allegation of fact will not relieve the party making the allegation of the burden of proving it.

3. *Legal Authority:* Citations of statutes, rules, orders and decided cases in support of the response, or in opposition to the granting of the relief sought in the initial pleading.

4. *Relief Sought:* A brief statement of the relief sought by respondent, including any affirmative relief sought which is not set out in the initial pleading.

(d) SUBSCRIPTION: As in the initial pleading.

(e) TIME FOR FILING: Response to a complaint shall be filed within ten days after service thereof on the respondent or within such other time as the Commission

may order. Response to an application may be filed at or before the hearing before the Commission or hearing officer. Any party appearing at the hearing shall be heard and permitted to offer evidence whether or not he has filed a written response or other pleading.

(f) DEFAULT: Any named respondent who fails to file response within the time specified shall be deemed in default, and the Commission, or hearing officer, may proceed to hear the cause without further notice to a party in default. No party will by default of an adverse party be relieved from the burden of proving the material allegations of fact upon which his claim for relief is based.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 14

SUBSEQUENT PLEADINGS:

(a) REPLY: No pleadings shall be required other than the initial pleading and responses thereto. Reply to a response shall be permitted but shall not be required.

(b) MOTIONS: All other objections or requests for action or relief shall be by motion, with service upon all parties of record by regular mail, stating in concise language the action or relief sought, and the facts and circumstances upon which the right thereto is based. All motions will be heard at the hearing on the merits of the proceeding unless set specially, in which case the party securing special setting shall cause notice thereof to be served by regular mail on all parties of record.

(c) RESPONSE TO MOTIONS: Any adverse party may file and serve a response to any motion at any time before the motion is heard.

(d) AMENDMENTS: Amendment of a pleading may be permitted at any time, upon such terms as are just. Amendments may take the form of a substitute pleading, an amendment or supplement, deletion of language or cor-

rection by interlineation. Response may be made to an amended pleading, but shall not be required.

(e) SUPPLEMENTAL COMPLAINTS: A supplemental complaint will be filed whenever it is desired to join additional respondents, to set forth new grounds for complaint discovered or occurring after the filing of the original complaint, or to seek new or additional relief. A supplemental complaint shall be served in the same manner as an original complaint. A supplemental complaint will be filed in the same proceeding as the original complaint wherever practical.

(f) SUPPLEMENTAL APPLICATION: A supplemental application will be filed whenever it is desired to seek relief of any nature not encompassed by the original notice. Notice of a supplemental application will be given in the same manner as for an original application. A supplemental application will be filed in the same proceeding as the original application wherever practical.

(g) DISMISSAL: The party commencing a proceeding may dismiss the application with or without prejudice at any time prior to commencement of the hearing. Such dismissal shall not dismiss the proceeding as to affirmative relief sought by any other party of record. At any time after the hearing has commenced, a proceeding may be dismissed only by Order of the Commission, which may be granted or denied in its discretion, and may be with or without prejudice.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 15

INTERVENTION:

(a) Any party interested in the subject matter of a proceeding may intervene and be heard therein by filing an appropriate pleading. An intervention on the side of the applicant shall be styled "Intervening Application"; and an

intervention in opposition to the applicant shall be styled "Response." Any other such pleading shall be styled "Intervention."

(b) An intervention shall follow the form provided elsewhere in these rules for an application or a response. An intervention may seek affirmative relief.

(c) Each intervention shall be served by regular mail on all parties of record. Notice of an intervention which seeks relief not encompassed in the original notice shall be served and published as required upon commencement of a proceeding.

(d) The Commission may prescribe terms and conditions upon which intervention shall be allowed, and may deny permission to intervene.

(e) An intervention shall be filed at or before commencement of the hearing before the Commission or hearing officer. Intervention may be allowed thereafter upon conditions that are just.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 18

DEPOSITION AND DISCOVERY:

(a) DEPOSITIONS:

(1) Deposition of a witness for use at a hearing may be taken only when ordered by the Commission, with or without notice, upon application of a party or on the Commission's own motion. The order may direct that the deposition of a witness be taken inside or outside the State of Oklahoma.

(2) The order shall state the time and place the deposition shall be taken, and the party taking the deposition shall serve a copy of the order by regular mail on each party of record at least five days prior to the date scheduled for taking the deposition.

(3) The manner of taking depositions shall otherwise be governed by the laws relating to taking of depositions for use in the District Courts of Oklahoma. Attendance of a witness for taking of his deposition shall be governed by Rule 22, except that the attendance of a witness for deposition shall be required only in the county of his residence.

(4) A deposition may be offered in evidence at the hearing by any party.

(b) PRODUCTION OF DOCUMENTS:

(1) Upon application of a party, or upon the Commission's own motion, with or without notice, the Commission may make an Order requiring a party to produce designated documents or tangible objects for inspection by parties to the proceeding, or for copying at the expense of the applicant, or to be offered in evidence. The Order shall direct production thereof at the hearing, or at a pre-hearing conference and production shall be at the principal office of the Commission, unless some other place is stated in the Order. An Order hereunder may be directed to a party not yet a party of record, conditioned that if such party appears at the hearing, the Order thereupon will be complied with.

(2) The party applying therefor shall serve a copy the Order by regular mail on each party of record at least five days prior to the date upon which production is required.

(3) An Order pursuant to this rule may require production of any document not privileged which constitutes or contains evidence relevant to the subject matter of the proceeding, or may reasonably lead to such evidence. Business records shall not be deemed privileged as such; but confidential business records and information will be protected from disclosures except where directly relevant to the issues in the proceeding.

(4) The Order shall identify the documents or objects to be produced individually or by categories, with sufficient particularity to permit easy identification thereof by the party ordered to make production.

(5) An exact photographic copy of a document may be substituted for the original, at the expense of the person producing the instrument.

(c) INTERROGATORIES:

(1) Upon application of a party, or upon the Commission's own motion, with or without notice, an Order may be entered requiring a party to answer in writing under oath of the party or a person authorized to make the answer, certain written interrogatories attached to the Order. The answers shall be submitted at the hearing, or at a pre-hearing conference.

(2) The party applying for the Order shall serve a copy thereof, with interrogatories attached, by regular mail, upon each party of record at least ten days prior to the date upon which answer is required.

(d) PROTECTIVE ORDERS:

(1) The Commission, or hearing officer at the hearing, at any time upon application of a party, with or without notice, may make such orders relating to discovery as may be necessary or appropriate for the protection of the parties, and to prevent hardship to and excessive burden upon a party. Such orders may, among other subjects, limit the scope of depositions, prohibit questions or subjects of inquiry, require or excuse answers to questions on deposition, limit or excuse, in whole or in part, production of documents or answers to interrogatories, and shorten or extend the time within which any act shall be performed.

(2) The Commission may make appropriate orders, including dismissal of a proceeding or denial of relief, as may be warranted for failure or refusal to comply with an order issued pursuant to this rule.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 20

PRE-HEARING CONFERENCE:

(a) The Commission, with or without request of any party of record, may order the parties or their attorneys to appear at a designated time for a pre-hearing conference to consider:

(1) Simplification of the issues: amendments to pleadings.

(2) Presentation of issues of law, adjudication of which may simplify or eliminate issues of fact.

(3) Admissions and stipulations of fact which will avoid unnecessary evidence and testimony.

(4) Identification of documents to be offered at the hearing.

(5) Identification of and numerical limit upon experts and other witnesses.

(6) Discovery and production of documents, records, data and other information.

(7) Audit, investigation and visitation by the Commission or its representatives.

(8) Other matters as may aid in trial of the proceeding.

(b) Actions taken at the pre-hearing conference may be embodied in a preliminary order, which order shall control subsequent proceedings and shall be binding on all parties, whether or not present, unless modified to prevent manifest injustice.

(c) Notice of the time and place of a pre-hearing conference shall be as prescribed by order of the Commission, and shall be served by regular mail upon all parties of record.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 21

WITNESSES:

(a) *Subpoena:* The Commission, upon request of a party, or upon its own motion, may order the Secretary to issue subpoena in the name of the Commission in any pending proceeding requiring attendance of a witness from any place in the state to the place of hearing. Praecipe for subpoena shall be filed with the Secretary and the Order of the Commission endorsed thereon.

(b) *Subpoena duces tecum:* A subpoena may require the witness to produce at the hearing books, records, accounts, papers and other instruments and tangible objects, which shall be described with reasonable particularity in the subpoena. A subpoena duces tecum directed to a party not an individual may direct that the records be produced by an officer or employee responsible therefor.

(c) *Service of subpoena:* A subpoena may be served by a law enforcement officer, by an attorney, or by any other person competent to make an oath; and the person serving the same shall attach his affidavit of the person served, and time and manner of service. Service also may be made in any other manner provided by law. A party may be served by leaving a copy thereof at the principal place of business of the party, with the party or an employee who customarily serves as the Secretary or receptionist of the party.

(d) *Return:* The original subpoena, with affidavit of service thereon, shall be filed with the Secretary of the Commission. The attendance of a witness shall not be enforced unless the original subpoena is on file at the time of the hearing.

(e) *Fees:* The attendance of a witness will not be enforced unless the party causing subpoena to be issued

tenders the witness fee provided by law for a witness subpoenaed to testify in the District Court of Oklahoma; and in addition, mileage to and from the place of hearing and the place of residence of the witness at 10¢ per mile. Attendance of a witness shall not be enforced at the second or subsequent day of hearing unless the party causing the subpoena to be issued tenders additional mileage to and from the place of hearing, or $25.00 for meals and lodging for each additional day of attendance, whichever is lesser. The payment of fees shall not be required when a subpoena is issued on behalf of the Commission.

(f) *Testimony:* A witness present at a hearing pursuant to subpoena may be called to testify by the Commission or by any party.

(g) *Protective Orders:* The Commission may make any orders with respect to subpoena and attendance of witnesses with or without application or notice, as may be appropriate for the protection of parties and witnesses, including an Order excusing attendance, or limiting documents to be produced.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 22

HEARINGS:

(a) CONDUCT OF HEARING: Every hearing shall be conducted by the Commission, or by a Commissioner or hearing officer to whom the proceeding has been referred. The presiding officer shall call the cause for hearing, after which proceedings shall be had as follows:

(b) SCOPE OF HEARING: The presiding officer may state the purpose and scope of the hearing, or the issues upon which evidence will be heard.

(c) APPEARANCES: Every party appearing shall enter his appearance by stating his name and address. An individual may appear on his own behalf. A corporation may appear only by its attorney.

(d) PRELIMINARY MATTERS: The following shall be taken up prior to receiving evidence:

(1) The applicant, or staff counsel, may offer preliminary exhibits, including pleadings necessary to present the issues to be heard, notices, proof of publication and orders of the Commission previously entered in the proceeding. Any other party may offer additional preliminary exhibits.

(2) Ruling shall be made on any pending motions, including requests for discovery.

(3) Stipulations of fact and stipulated exhibits shall be received.

(4) Parties shall make opening statements where appropriate.

(5) Any other preliminary matters appropriate for disposition prior to offers of evidence.

(e) RULES OF EVIDENCE: The Commission shall follow the rules of evidence applied in the District Courts of Oklahoma, except that such rules may be relaxed where the Commission or the Hearing Officer deems it in the public interest to do so. The Commission or a Hearing Officer may exclude evidence upon objection made thereto, or the evidence may be received subject to final ruling by the Commission. An exception will be deemed to be saved to a party objecting to evidence upon an adverse ruling thereon. The presiding officer may exclude inadmissible evidence on his own motion, and may direct cumulative evidence to be discontinued.

(f) ORDER OF PROOF: The applicant or complainant who institutes a proceeding shall open and close the proceeding. Staff counsel shall open and close a proceeding instituted by the Commission or a staff member. Intervenors shall be heard immediately following principal parties with

Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation, ET AL.,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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July, 1977

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In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation; FARMERS UNION COOPERATIVE GIN AT MARTHA; HARMON COUNTY COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT DILL CITY; FARMERS UNION COOPERATIVE GIN AT SENTINEL; PLANTERS COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT ELK CITY; FLEET-TERRAL GIN COMPANY; COTTON FARMERS COOPERATIVE GIN; FARMERS COOPERATIVE GIN AND LUMBER; LINCOLN PROPERTY CO.; RODEWAY INNS, INC.; and G.E.M. 15, INC.; J. H. FRATES and JOHANNA I. FRATES, TRUSTEES; THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC.; CRYSTAL BOWL, INC.; a corporation; HARVARD LANES, INC., a corporation; ROSE BOWL LANES, INC., a corporation; SAHOMA BOWLING LANES, INC., a corporation; SHERIDAN LANES, INC., a corporation; TIFFANY BOWL, INC., a corporation; YALE BOWL, INC., a corporation; and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

The Respondent, Public Service Company of Oklahoma ("PSO"), submits its brief in opposition to the Petition of Chickasha Cotton Oil Company, et al., asking that a Writ of Certiorari be issued to review the judgment of the Oklahoma Supreme Court in this case.

I.
OPINIONS BELOW

The opinions below are as set forth in the Petition.

II.
JURISDICTION

The Respondent does not question that this Court has jurisdiction to review this case under 28 U.S.C. §1257(3).

III.
QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment provide sub-

stantive rights of notice and hearing to public utility customers beyond such rights as are provided by the laws of the State of Oklahoma?

2. Does Article I, Section 10(1) of the United States Constitution prohibit the State of Oklahoma from establishing new public utility rates when the previous established rates have since been embodied in contracts between the utility and its customers?

3. Will a Writ of Certiorari issue when the Petitioners have adequate state remedies?

IV.
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

As a supplement to the statutory material provided by Petitioners, the following statutes and rule involved in this case are set forth verbatim in Appendix F; citations are as follows:

Okla. Stat., Title 17, §124 (Appendix E-1)
Okla. Stat., Title 17, §155 (Appendix E-1)
Corp. Comm. R. of Practice 26(b) (Appendix E-2)

V.
STATEMENT OF THE CASE

Petitioners seek certiorari to the Supreme Court of the State of Oklahoma upon the denial by that court of a writ of prohibition forbidding the collection of rates set by the

Oklahoma Corporation Commission for electric utility services. Specifically, the "Petition for Writ of Prohibition and Injunction" filed November 3, 1975, by which Petitioners initiated an original action in the Oklahoma Supreme Court, sought (1) a "judicial declaration" that Order No. 112286 of the Oklahoma Corporation Commission, establishing rates for electric service to be charged by PSO, is "void and invalid;" (2) an order prohibiting the Oklahoma Corporaion Commission from enforcing its Order; (3) an order prohibiting PSO from collecting the rates established pursuant to Order No. 112286 and requiring PSO to remit all payments for electric utility service made by members of the "Plaintiff class" in excess of rates in effect prior to the issuance of Order No. 112286; and (4) an order requiring PSO to pay costs and attorneys' fees to Petitioners' attorney. The action purported to be brought on behalf of a class consisting of all customers of PSO who fell under "special" tariffs prior to the entry of Order No. 112286 or, alternatively, a class consisting of cotton gins which receive electric service from PSO.

The procedural and factual history of the case, insofar as it relates to the questions presented to this Court, is as follows:

On December 3, 1974, PSO filed an Application (Appendix A) alleging that it was not receiving a fair and adequate rate of return on its assets devoted to public utility service in the State of Oklahoma and praying that the Corporation Commission, after appropriate investigation and hearing, "authorize applicant to adjust its rates to provide an additional $20,150,000 in additional revenue and to spread the increase equally through its rates to permit a reasonable return . . . "

On December 9, 1974, the Corporation Commission issued a Notice and Order Setting Cause for Pre-Hearing and Hearing. On January 16, 1975, the Corporation Commission issued a new Notice and Order Setting Cause for Pre-Hearing and Hearing (the "Notice and Order") (Appendix B), revising the dates set forth in the December 9 Notice and Order and setting the Pre-Hearing for February 19, 1975 and the Hearing for March 19 and 20, 1975. The Notice and Order further directed PSO "to have copies of all basic exhibits and testimony that it will rely on in its Case-in-Chief filed and ready to furnish to interested parties at least 10 days prior [to the February 19 pre-hearing]."

Both the December 9 and January 16 Notice and Order gave the following information concerning the Application:

> "NOTICE IS HEREBY GIVEN that the above-named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate return on its plant, property and other assets devoted to public utility service in Oklahoma."

Likewise, both Notices provided as follows:

"IT IS FURTHER ORDERED that after hearing, the Commission, *regardless of the relief requested in the Application*, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application." (Emphasis added)

The Notice and Order of January 16 was published pursuant to its terms and the requirements of Rule 11(e), Rules of Practice promulgated by the Corporation Commission. Notice by publication was given once a week for two weeks in a newspaper of general circulation in the county seat of every county in which PSO had customers affected by the application (a total of 48 counties). Notice by mailing was given to the Chief Executive Officer of each municipality in which PSO furnishes electrical service (a total of 206 cities and towns.) At about this time also, PSO was advised informally that information concerning restructing PSO's confusing and proliferating tariffs should be included in the evidence to be presented at the prehearing.

On February 19, 1975, according to regular Oklahoma Corporation Commission procedure, a pre-hearing conference was held, at which time all parties were entitled to take the testimony of PSO on pre-trial matters. On March 19, 20 and 26, 1975, evidentiary hearings were held after which the matter was taken under advisement. At the

hearings, in addition to attorneys for PSO, the following parties were represented by counsel: The Corporation Commission, the Oklahoma Chapter of the Sierra Club, Oklahoma Consumer Protection Agency, Inc., National Electrical Contractors Association and Sun Oil Company. Elmer Graham of Temple, Oklahoma appeared pro se. Formal protests were filed by the City of Broken Arrow and the City of Chickasha.

On April 15, 1975, the Commission issued Order No. 112286 (Appendix C). Subsequently, several parties affected by the new rate structure, including several of the Petitioners herein, filed applications for rehearing by the Commission. On May 28, 1975, the Commission issued Order No. 113045, denying the motions for rehearing.

On June 27, 1975, some of the parties who had sought a rehearing filed a Petition in Error with the Oklahoma Supreme Court alleging inadequacy in the Notice given by the Commission. The Court dismissed the appeal on November 10, 1975 as untimely. None of the original petitioners below, the Cotton Gins, filed either an application for rehearing or an appeal from the Corporation Commission's order. The Cotton Gins took no action at all from the date of the Order, April 15, 1975, until filing a Petition for Writ of Prohibition on October 3, 1975 — almost five months after the new rates went into effect.

The Supreme Court of Oklahoma considered the case on briefs of the parties without oral argument and on Octo-

ber 12, 1976, entered an order granting the Writ of Prohibition.

On October 22, 1976 and October 27, 1976, the Oklahoma Corporation Commission and PSO, respectively, petitioned for rehearing. The Court allowed intervention of several amici curiae and heard oral argument by all parties in intervenors on December 7, 1976. On March 8, 1977, the Court, in an extensive opinion (Appendix D), granted the petitions for rehearing and denied the Writ of Prohibition on grounds that (1) the Oklahoma Corporation Commission had complied with its procedural rules, and (2) the notice required by the Oklahoma Corporation Commission rules complied with Oklahoma law and due process. Specifically, the majority opinion dealt with the requirement of due process as follows:

> "We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned. It was not required to give judicial due process notice and hearing to the Petitioners unless specifically required by statute. There is no present statutory provision requiring notice."

VI.

CONCISE ARGUMENT

A. Petitioners Improperly Seek to Have this Court Substitute Its Judgment for that of the Oklahoma Supreme Court.

Although Petitioners have carefully couched their arguments in "due process" terminology, the principal thrust of the Petition is an attempt to have this Court substitute its judgment for that of the Oklahoma Supreme Court as to the requirements of Oklahoma law for setting public utility rates. Such relief simply is not available in this Court, whose jurisdiction to review the judgments of state courts by writ of certiorari extends only to questions of federal law. 28 U.S.C. §1257. The Oklahoma Supreme Court is the final arbiter of Oklahoma law and Petitioners' allegations that it has wrongfully decided questions of Oklahoma law cannot confer jurisdiction on this Court to review those decisions. In *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 139, 82 L.Ed. 702 (1938), a public utility appealed to the Supreme Court from a rate order made by a utility commission and affirmed by the state courts. This Court stated:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. *It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements.*" (Emphasis added)

Accord, Hortonville Joint School Dist. No. 1 v. Hortonville

Educ. Ass'n, ____ U.S. ____, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 27 L.Ed.2d 571 (1971).

Petitioners' allegation that "The Oklahoma Supreme Court in effect held that . . . the Oklahoma Corporation Commission need not comply with its own rules nor require due process notice" of its rate-making hearings (Petition, p. 16) simply misstates the Oklahoma Supreme Court decision, as does the assertion that "this holding is in direct conflict with *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681 (1954), *Service v. Dulles*, 354 U.S. 363, 1 L.Ed.2d 1403 (1957), and *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, 22 L.Ed.2d 709 (1969). These erroneous statements attempt to raise an issue not properly reviewable by this Court. As is clear from the majority opinion, the court most assuredly did not hold that the Corporation Commission could defy Oklahoma law, its own rules, or the United States Constitution. To the contrary, it found *compliance* by the Corporation Commission with all relevant provisions of Oklahoma law, including the Commission's own procedural rules.

B. Petitioners Received all the Notice of the Hearing to Which They were Entitled.

The Oklahoma court did hold that Fourteenth Amendment due process imposes no notice or hearing requirement upon the utility rate-making process other than as might be

required by state law. While this ruling is subject to review, Respondent respectfully submits that it is in total accord with prior decisions of this Court and hence not a proper subject for the exercise of this Court's extraordinary discretionary review.

In setting public utility rates for general categories of consumers, the Oklahoma Corporation Commission acts as a legislative or quasi-legislative body, and not as a quasi-judicial body. *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 70 L.Ed. 747 (1926); *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 53 L.Ed. 150 (1908); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957 (Okl. 1967); *Hine v. Wadlington*, 111 P. 543 (Okl. 1910). Since the Commission is acting as a legislative body in setting rates, the due process clause of the Fourteenth Amendment does not require it to give notice and an opportunity to be heard to all persons potentially affected by a rate change. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 60 L.Ed. 372 (1915); *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 392 F.Supp. 692 (W.D. Okla. 1974); *Shoenberg Farms, Inc. v. Colorado*, 444 P.2d 277 (Colo. 1968); 2 Am.Jur.2d *Administrative Law* §403.

The practical necessity for this virtually universal rule is obvious. The setting of rates for a public utility affects, directly or indirectly, millions of citizens. The Commission charged with the responsibility, therefore, must weigh broad social questions, both in deciding what rate of return

is fair to the utility and in allocating the benefit and costs of the utility's service among its customers. (The Cotton Gin Petitioners, themselves regulated utilities, obtain approval of their rates by the same procedure.) It is impossible for the Commission to hear each customer's reasons why his share of the cost should be greater or less than that of his neighbor. Rather, as Justice Holmes observed in response to an attack on Colorado's method of raising real property assessments:

> "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society by their power, immediate or remote, over those who make the rule."

Bi-Metallic Investment Co. v. State Board of Equalization, supra, 239 U.S. at 445, L.Ed. at 375. In Oklahoma, the Corporation Commissioners who set utility rates are elected officials (OKLA. CONST. Art. 9, §15), and, as the Oklahoma Supreme Court has held:

> "The corporation commission represents the consumer and its orders fixing rates are for the benefit of the consumer."

American Indian Oil & Gas Co. v. George F. Collins & Co., 9 P.2d 438, 442 (Okl. 1932). *Accord, Smith v. Illinois Bell Tel Co., supra,* 270 U.S. at 592, 70 L.Ed. at 749.

(". . . the commission represents the public and especially the subscribers, and they are properly bound by the decree.")

Thus, the legislative nature of rate-making makes use of judicial due process standards for notice and hearing inappropriate. Moreover, it is well established that the due process clause of the Fourteenth Amendment requires notice and a hearing prior to governmental action only if the interests abridged are encompassed within the Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth,* 48 U.S. 564, 33 L.Ed.2d 548 (1972). It has long been held that a consumer's access to the services of a public utility is not such a property right. *Wright v. Central Kentucky Natural Gas Co.,* 297 U.S. 537, 542, 80 L.Ed. 850 (1936); *Norwegian Nitrogen Prod. Co. v. United States,* 288 U.S. 294, 318, 77 L.Ed. 796 (1933); *Teleco, Inc. v. Southwestern Bell Tel Co., supra; United States Light & Heat Corp v. Niagara Falls Gas & Electric Light Co.,* 47 F.2d 567 (2nd Cir. 1931); *Sellers v. Iowa Power & Light Co.,* 372 F.Supp. 1169 (S.D. Iowa 1974).

C. Cases Cited by Petitioners are Inapplicable to the Issues Presented.

The cases cited by Petitioners are not in conflict with the principles discussed above, nor do they offer any independent support for Petitioners' thesis. Neither *Morgan v. United States,* 298 U.S. 468, 80 L.Ed. 1288 (1936), nor

Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103 (1908), held that due process requires any form of notice or hearing in rate-making proceedings. *Morgan* at most stands only for the principle that the officer exercising the statutory authority to fix rates must also accept the statutory obligation of hearing the evidence upon which the decision is to be made. It applied to specific legislation and, like many of the cases cited by Petitioners, involved an appeal by the regulated industry itself, which is acknowledged to have a property interest in its own rates. *Londoner*, on the other hand, does indeed prescribe judicial notice and hearing under very narrow circumstances, but is more applicable here by virtue of its clear holding that the plaintiffs were entitled to no voice in the city's decision-making process, nor even any notice that a decision was being contemplated, until they were singled out for treatment *different* from that of the populace as a whole. In *Bi-Metallic*, this Court distinguished *Londoner* as dealing with an unusual situation which had the characteristics of a judicial rather than a legislative proceeding. *Bi-Metallic Investment Co. v. State Board of Equalization, supra*, 239 U.S. at 445-446. *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 79 L.Ed. 761 (1935), like *Morgan*, dealt not with notice of rate proceedings to *customers* of a utility, but to the *utility* itself, and hence lends no support to Petitioners' untenable claim that every utility user is entitled to the same notice and opportunity to be heard as is the utility whose rates are being set.

Lastly, Petitioners cite several cases in which "[T]he specific issues raised herein have been decided favorably to Petitioners' claim . . ." However, the cases cited by Petitioners do not interpret the constitutional standard of due process, but in most cases the Administrative Procedure Act, which sets out specific notice and hearing provisions for federal administrative agencies.* As discussed earlier, all state provisions concerning notice and hearing have been complied with by the Oklahoma Corporation Commission. The Administrative Procedure Act and the cases interpreting it are therefore not relevant.

D. The "Contracts Clause" of Article I, Section 10 of the Constitution Does Not Prohibit New Rate Making by the Corporation Commission.

Petitioners apparently rest their claim that the action of the Corporation Commission abrogated contract rights

*See, *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969); *Wagner Electric Corporation v. Volpe*, 466 F.2d 1013 (3d Cir. 1972); *Pharmaceutical Manufacturers Assoc. v. Finch*, 307 F.Supp. 858 (Del. 1970); *Chicago, Burlington & Quincy Ry. Co. v. United States*, 242 F.Supp. 414 (N.D. Ill. 1965). In *Virgin Island Hotel Ass'n v. Virgin Island W & P Auth.*, 465 F.2d 1272 (3d Cir. 1972), the court found that the notice given failed to comply with a Virgin Islands statute, not constitutional due process. In *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966) the court held that the commission had to comply with its own previously set rules in an enforcement proceeding against one defendant. In *Re Public Service Co. of Indiana, Inc.*, 21 PUR3d 310 (1957) the Indiana Utility Commission itself decided to give new notice and hold a further hearing before establishing new rates; no judicial review was involved in the case at all.

in violation of Art. I, §10(1) of the Constitution on *Arkansas Natural Gas Company v. Arkansas Railroad Commission*, 261 U.S. 379, 67 L.Ed. 705 (1923). That case, however, offers absolutely no support for Petitioners' contention that they were entitled to separate hearings on their rate solely because the rates previously set by the Corporation Commission had been set out in contracts between Petitioners and PSO. While *Arkansas Natural Gas* does state that such contracts cannot be set aside by the state solely because they are burdensome to one of the parties, it affirms this Court's prior holdings that "a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts," so long as the power is exerted for the public welfare. See, *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 81 L.Ed. 540 (1937); *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 63 L.Ed. 309 (1919). Petitioners do not assert that the Corporation Commission's finding of public need for new rates was incorrect, nor can they claim it was unauthorized, since every notice made it perfectly clear that PSO's rates would be raised. Their argument that the change abrogated their contract in violation of Article I, §10 of the Constitution must be regarded as makeweight.

E. The Petitioners Have Adequate Remedies Available Under State Law.

The Petitioners have more than adequate remedies

under the law of Oklahoma which they have totally failed to pursue. Under Corporation Commission Rule 26(b) (Appendix E-2), the Petitioners could have filed an application for a new hearing any time ten days subsequent to the entry of Order No. 112286. The application allowed by the rule can seek to alter, amend or vacate the objectionable order. At this new hearing, Petitioners could show the Commission the particular circumstances which make the new rates unfair *as applied to them*, a particularized inquiry which would have been wholly inappropriate for the Commission to undertake during the hearings dealing with PSO's rates generally. Thus, since April 25, 1975, and to the present, Petitioners have had available to them the right to the very hearing they claim to have been denied, and a right to appeal to the Oklahoma Supreme Court should the Corporation Commission fail to grant the relief requested.

Instead of availing themselves of this unambiguous right under Oklahoma law, Petitioners waited almost six months to file for a Writ of Prohibition, and then chose to wage a broad attack on the entire rate-making process rather than simply to seek relief from the new rates which they apparently feel are unduly burdensome when applied to their particular business enterprises. The route pursued by Petitioners has been inappropriate, given their actual needs, and has caused over two years delay in unnecessary court proceedings while the relief they actually sought was

readily obtainable, if shown to be appropriate, from the Corporation Commission. Moreover, even if Petitioners obtained the relief actually available from this litigation, it would be nothing more than a hearing before the Corporation Commission, which is the sole body constitutionally capable of determining the appropriate rates for electric utility service. Thus, a grant of the Writ of Certiorari, and even an ultimate decision in their favor, would give Petitioners neither more nor less than what has been available to them for over two years. It is clear, therefore, that the Petition offers no ground for the exercise of discretionary jurisdiction by this Court.

VII.
CONCLUSION

Petitioners attempt to bootstrap themselves into recognized constitutionally-protected positions by starting from a premise for which they can offer no authority. No case cited by Petitioners affords the slightest support to the proposition that the Federal Constitution affords them some right to notice and hearing independent of and greater than the provisions of Oklahoma law, which have been complied with. To the contrary, the cases uniformly hold that any right a utility customer may have to notice of rate hearings is wholly a matter of state law.

The decision of the Oklahoma Supreme Court is supported not only by the prior decisions of this Court and others, but sound public policy as well. Like every other state, Oklahoma has created a carefully thought out constitutional and statutory scheme for the supervision of public utility rates and services. The State has vested in the Commission, which is directly responsible to the electorate, the power to establish public policy with respect to the development of alternative energy sources, the allocation of utility services and the manner in which the cost of those services will be spread throughout the consuming public. Petitioners assert, in effect, that the Commission should no longer focus its inquiry in general rate-making hearings on the broad questions of what will most benefit the State as a whole but must instead turn their attention

to the claims of hundreds or thousands of individual customers that their particular use characteristics or hardships justify special treatment.

For all the reasons stated, Respondent respectfully requests that a Writ of Certiorari to the Supreme Court of the State of Oklahoma be denied.

Respectfully submitted,

PUBLIC SERVICE COMPANY
OF OKLAHOMA
P. O. Box 201
Tulsa, Oklahoma 74103

By _____
ROBERT L. LAWRENCE

DOERNER, STUART, SAUNDERS, DANIEL
& LANGENKAMP
1200 Atlas Life Building
Tulsa, Oklahoma 74103

By _____
R. DOBIE LANGENKAMP
WILLIAM H. HINKLE

CERTIFICATE OF SERVICE

I, R. DOBIE LANGENKAMP, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, Public Service Company of Oklahoma, hereby certifies that on the 2nd day of July, 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Oklahoma Supreme Court on the following parties:

Rex Privett, Chairman of
The Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Larry Derryberry, Attorney General
of the State of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Ed Overholser, Secretary of
Oklahoma Corporation Commission
Jim Thorpe Office Building
Oklahoma City, Oklahoma 73105

Terry Shipley
119-½ South Main Street
Noble, Oklahoma 73068

_____
R. DOBIE LANGENKAMP

APPENDICES

APPENDIX A

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

FILED
DEC - 3 1974
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)	CAUSE NO. 25346

APPLICATION

Comes now Public Service Company of Oklahoma, a domestic corporation, hereinafter referred to as Applicant, and for its cause of action, alleges and states:

I.

1. That Applicant is a corporation created and organized by and under the laws of the State of Oklahoma duly authorized to conduct business therein, with its principal office at First National Tower, P.O. Box 201, Tulsa, Oklahoma 74102. That it is a public utility with plant, property and other assets dedicated to and for the generation, transmission, distribution and sale of electric energy within and throughout a large number of counties within Oklahoma.

2. That its present rates and charges were approved by the Corporation Commission of the State of Oklahoma in its Order No. 70384, entered on the 19th day of November, 1968.

II.

1. That since the date of said Order, Applicant has been faced with increases in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities. That all increases have been beyond the control of Applicant and have resulted in Applicant earning less than a reasonable return on the fair value of its plant, property and other assets devoted to public utility services in the State of Oklahoma.

2. Applicant has made a concentrated effort, by economizing in operation to combat and offset cost increases. However, the increased costs of goods, services and money have far exceeded . . .

3. That due to the foregoing, the Applicant is not earning a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Okahoma.

That for the year ending December 31, 1974, Applicant will earn a pro forma rate of return of less than 5¼% on its fair value public utility rate base of approximately $606,000,000. Without the rate adjustment herein requested, the rate of return will decrease to less than 4½% in 1975.

4. That the cost for fuel that is necessary to generate electricity to supply Applicant's customers is increasing, and the fuel adjustment clause does not recover all of the increased cost.

5. That an additional $20,150,000 should be provided by an adjustment to Applicant's rates under the jurisdiction of this Commission which amount is an increase of 12.5%. $3,100,000 in additional revenue should be provided through a modification of the fuel cost adjustment clause for sales

to the Grand River Dam Authority so that this fuel cost adjustment clause will be as nearly as possible on the same basis as applied to other customers, which modification has been requested by a filing with the Federal Power Commission. The total of $23,250,000 in additional annual revenue is needed to provide Applicant a reasonable rate of return on the fair value of its plant, property and other assets and to allow a reasonable return on its equity capital.

III.

Jurisdiction of the Commission in this proceeding is based on its authority to fix rates and charges found in 17 O.S. 1971, Section 151, 152, and the general regulatory power in Article IX, Section 18, of the Constitution of the State of Oklahoma and related sections, which have been extended to electric utilities.

IV.

WHEREFORE, Applicant prays:

That the Corporation Commission of the State of Oklahoma, after giving notice of hearing and after appropriate investigation and hearing as prescribed by its rules, authorize Applicant to adjust its rates to provide an additional $20,150,000 in annual revenue and to spread the increase equally throughout its rates to permit a reasonable return on its equity capital and permit Applicant to earn a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Oklahoma.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF OKLAHOMA

s/ By Robert L. Lawrence
Robert L. Lawrence

s/ Everett L. Cunningham
Its attorneys

First National Tower
P. O. Box 201
Tulsa, OK 74102
Phone: 918/583-3611

APPENDIX B

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

FILED
JAN 16 1975
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT OF ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)	CAUSE NO. 25346

NOTICE AND ORDER SETTING CAUSE
FOR PRE-HEARING AND HEARING

NOTICE IS HEREBY GIVEN that the above-named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma.

NOTICE IS FURTHER GIVEN that a Notice and Order Setting this Cause was previously issued wherein the pre-trial hearing was scheduled for March 25, 1975, and hearing on the merits April 24, 1975. However, these previously scheduled hearing dates have been cancelled and changed to dates hereinafter stated.

IT IS THEREFORE ORDERED that this Cause be set for pre-hearing conference in the Commission's Courtroom,

Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at 10:00 a.m., on the *19th* day of *February, 1975*. Applicant is directed to have copies of all basic exhibits and testimony that it will rely on in its Case-in-Chief filed and ready to furnish to interested parties at least 10 days prior to this hearing.

NOTICE IS FURTHER GIVEN that at the pre-hearing conference the Commission will consider and rule on motions, requests for information, and determine other procedural matters.

IT IS FURTHER ORDERED that this Cause be set for hearing on the merits before the Commission en banc in its Courtroom, Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at *10:00 a.m.*, on the *19th and 20th days of March, 1975*.

IT IS FURTHER ORDERED that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.

IT IS FURTHER ORDERED that after hearing, the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application.

All inquiries for information concerning this Application should be directed to Mr. Robert L. Lawrence, General

Counsel, Public Service Company of Oklahoma, P. O. Box 201, Tulsa, Oklahoma 74102.

DONE AND PERFORMED this 16th day of January, 1975.

CORPORATION COMMISSION OF OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

s/ Ray C. Jones
RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

APPENDIX C

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC SERVICE IN THE STATE OF OKLAHOMA	)	CAUSE NO. 25346
	)	ORDER NO. 112286

BY THE COMMISSION:

Robert Lawrence and Everett Cunningham, for the Applicant

Andrew Dalton for the Sierra Club of Oklahoma

Calvin Hendrickson, for N.E.C.A.

Jack A. Swidensky, Lee W. Cook, and David Wick, Jr., for the Commission

PRE-HEARING CONFERENCE: February 19, 1975.

HEARINGS: March 19, 20 and 26, 1975.

FINDINGS

Applicant, Public Service Company of Oklahoma, is a domestic corporation, a public utility with plant, property and other assets dedicated to, and used for the generation, transmission, distribution and sale of electric energy within and throughout a number of counties in Oklahoma, which currently serves 373,039 customers. It is one of four operating electric companies comprising Central and Southwest Corp., an electric holding company doing business in Oklahoma, Arkansas, Texas and northwestern Louisiana. Applicant accounts for approximately 31% of the consolidated holding company's revenue. Applicant's present rates and

charges were approved by this Commission in its Order No. 70384, entered November 19, 1968. In its Application, the Company proposed and sought to re-structure its tariffs and adjust its rates to provide an additional $23,500,000 in annual revenue using a test year ending December 31, 1974. However, $3,100,000 involves non-jurisdictional sales under the Federal Power Commission's jurisdiction, involving the Markham Ferry co-ordinating agreement (G.R.D.A.), dated August 5, 1957, which increase the Applicant requested be made effective January 1, 1975. Thus, the jurisdictional request proposed herein is for $20,150,000.

This proceeding was duly set for prehearing conference and public hearing, requiring that notice be given by mailing a copy of the notice to the Chief Executive Officer in each city or town in which the Applicant furnishes electric service and by publishing once a week for two consecutive weeks in a newspaper of general circulation in the county seat city or town of each county in which the Applicant has customers that will be affected by the Application.

During this hearing, a total of 100 exhibits were presented and received from the Applicant, protestants, intervenors and staff of this Commission. The Applicant introduced testimony showing revenue and expenses for the test year herein ending December 31, 1974, with normalization. Such normalization was made by making adjustments both in revenue and expenses to reflect weather conditions, non-firm off-system sales, etc., which reduced annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expense of $2,709,000, plus adjusted income taxes resulted in $29,089,000 in utility operating income for a 6.10% return on original cost rate base. Adjustments by the Commission staff to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the Commission staff adjusted original cost rate base of 7.32%. Total weighted

cost of capital was shown to be 8.5%, including a proposed 13% return on common equity.

The Applicant presented exhibits showing original cost and fair value rate base and exhibits showing rate of return on fair value and on original cost rate base. However, the Company during the hearing proposed a rate of return on original book cost less accrued depreciation and did not ask or propose trended costs, replacement costs, or fair value. The testimony of the Company indicated that it sought rate relief based upon a return of 8.5% on its original cost rate base.

RATE BASE

In this case, the Applicant presented testimony as to plant, revenue and expenses for a test period ending December 31, 1974. According to the Applicant's testimony, its plant and property devoted to utility service in the State of Oklahoma on a normalized or pro forma original cost basis, amounted to $447,238,000. However, this includes net plant in service, construction work in progress, plus an allowance for material and supplies and cash working capital. The Commission staff used an end of period rate base. On an original cost basis, the staff found the rate base to be $415,661,000 at the end of the test period. The main difference between the two original cost rate bases being the treatment accorded construction work in progress, cash working capital, material and supplies and accumulated deferred Federal Income Tax. The staff audit used average, beginning and ending year for materials and supplies and, we find and make adjustments upward to allow year end figures.

Applicant introduced evidence of growing acceptance for inclusion of "varying amounts" of construction work in progress with benefits both to the consumer and the Applicant. The Applicant and the Commission staff witness agreed that nuclear fuel in process of refinement should be

treated as a prepayment for material and supplies under working capital, and not as a part of work in progress. However, the Commission finds and determines that any expense or investment for nuclear energy facility should be excluded at this time, in view of the fact that no approval or authorization has been determined by the Nuclear Regulatory Commission. Work in progress is a subject matter which should be currently considered by the Commission, but we cannot accept the Applicant's full proposal herein.

Construction work in progress which is reasonable in amount and contemplated to be in service within a reasonable time after the end of the test year may properly be included in a utility's rate base on which it is entitled to earn a rate of return. There should be no allowance for funds used during construction accrued on Construction Work in Progress to the extent that Construction Work in Progress is included in rate base subject to the jurisdiction of the Commission upon which revenues are being collected. If such charges do not cease, the utility would obtain a double recovery on such charges, which can not and should not be approved.

Because a public utility must engineer and construct plant in advance of actual customer needs and cannot wait until those needs actually occur, the utility cannot be denied a reasonable return thereon unless it can be shown that the investment was improvident or imprudent. Neither the Commission nor the Applicant can operate in an abstract vacuum; and reasonable available cash flow must be provided. These items represent funds supplied by investors and are funds on which investors are entitled to an opportunity to earn a rate of return found fair and reasonable. The Commission feels that this is in the public interest and therefore finds that construction projects in progress which will be on line or in use no later than December 31, 1975, should be and are thus allowed in the current rate base. Consistent with the three year revenue increase treatment

given, the Commission allows rate base consideration of work in progress as found herein, to be $17,500,000 in 1975, and an additional $5,000,000 in 1976, an additional $5,000,000 in 1977, for a total of $27,500,000 thereafter.

Therefore, the Commission directs that the allowance for funds used on work in progress, in excess of amounts allowed herein be capitalized, for projects which exceed $5,000 and require more than thirty days for completion. The rate use for such computations shall be established at the beginning of each year and shall not exceed the Applicant's current cost of capital at that time. This computation shall be made monthly, and the amount so determined recorded on the Applicant's books by an increase to the work in progress account and an increase to other non-operating income. The effect of this procedure is to reflect a non-cash entry resulting in non-cash earnings on the current income statement and the deferral of realization of cash until the time the work in progress, including the allowance for funds used during construction, is placed in service and depreciation charges against income commerce.

Therefore, by the adjustments made herein, we find the adjusted rate base for 1975 to be $438,603,000; for 1976: $443,603,000; and for 1977: $448,603,000.

OPERATING RESULTS DURING THE TEST PERIOD, AS NORMALIZED

The Applicant introduced testimony showing revenue and expenses for the test period ending December 31, 1974, with normalization. These normalizations consist of making adjustments, both as to revenue and expenses to reflect what the revenue and expenses would have been had the conditions as of December 31, 1974 levels been prevalent during the entire twelve months, plus certain adjustments that have occurred or reasonably can be anticipated to occur outside the test period. These normalizing adjustments included an adjustment for abnormal weather con-

ditions and non-firm off-system sales which reduced the annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expenses of $2,709,000 plus adjusted income taxes resulted in $29,089,000 in utility operating income, for a 6.10% return on original cost rate base. Staff adjustments to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the staff adjusted original cost rate base of 7.32%.

The Applicant decreased revenue by $9,559,000 for abnormal non-firm off-system sales and decreased expenses by $1,709,000 for fuel to generate power for the non-firm off-system sales. The Applicant cannot conclusively prove that the power will not be sold, nor can the staff prove that it will be sold. However, the plant capacity is there, the need for KHW's is here, the company need only try to sell it. The question is, should the ratepayers or the stockholders have this burden and responsibility? The Commission cannot totally allow the adjustment as proposed. The staff adjusted fuel cost (and thus, working capital allowance) and labor cost, general and miscellaneous taxes and these adjustments are approved. The Applicant proposed in its municipal street lighting rate the 40% discount as now existing in current contracts. The Commission does not disapprove this, but for rate making purposes, this subject, in the amount of $113,800 should be treated as earned revenue so as to reduce revenue deficiency accordingly.

The Commission finds that the Applicant has exercised prudent operation by enacting cost reduction programs that have significantly reduced operating expenses. Promotional practices have been curtailed and advertising has been limited. Contributions are currently taken "below the line." Advertising expenses in the amount of $363,411 for consumer education and conservation of energy, as allowed by the Supreme Court, are found to be fair and reasonable and are allowed as a proper expense in this Cause.

The Applicant's use and treatment of their employee discount for residential service is approved. This record reflects a 5-year trend increase for uncollected bills and for the test period, $390,210. However, the Company wrote off $535,290 due to having to add to their reserve. This amount is allowed as expense but the company is directed to review and police this area due to our general rules allowing them to require a two months deposit, a 1½% late payment charge and a reconnection charge.

Consistent with our finding herein and the company's activity in the area of promotional practices, the company should advise this Commission's Public Utility Engineer, consistent with our Order No. 87994 and delete those practices or allowances not presently in effect. Likewise, this record reflects that the Applicant has one town served under a 3% franchise tax due to a previous purchase. This franchise payment should be processed, charged and paid consistent with Rule #54 of our Order No. 101932 and the excess over 2% should be separately stated on the face of the bill and charged consumers pro rata within the municipality.

The Commission finds the Applicant's proposed 13% return on common equity at December 31, 1974 levels is fair and reasonable. Consistent with our adjustments and findings made herein, we determine a gross revenue deficiency for 1975 of $13,927,000.00; for 1976, an additional $863,000, and for 1977, an additional $863,000.

RATES AND RE-STRUCTURING

This record reveals that Applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, and thus the proposal to re-structure into nine rates is absolutely necessary and clearly in the public interest. However, this re-structuring and the harsh immediate economic impact on customers has

bothered and concerned the Commission during these entire proceedings.

First, the Commission finds that Applicant's proposals in their submitted tariffs, concerning their fuel cost and heat rate factors are not in compliance with current general orders and shall not be accepted for filing and approval by the Commission's Public Utility Engineer until they are consistent with Rule No. 55, Order No. 101932 and so approved by that department. Under Applicant's proposal, fuel cost based at 50 cents per MCF, at a heat rate factor of their proposed 11,500 KWH would cause the cost of fuel to be 5.75 mills per KWH; which, in fact, is higher than Applicant's cost of fuel under the accepted formula in Order No. 101932. Also, the tax adjustment clause in each filed tariff shall be amended to delete the language, "or contributions or payments in lieu thereof, or other exactions", and shall add the following language at the end of that sentence: "when voted by the people at a regularly called franchise election."

The Sierra Club of Oklahoma presented the testimony of Dr. Eugene P. Coyle, the thrust of which covered the efficiency-incentive function of rate design, incremental cost pricing, tail block rates reflecting incremental cost and not priced at average or fully-distributed costs, raising the lower block rates and decreasing the first few steps, restricting rates below cost to industry to attract more industry and then making up these low rates to industry by charging the residential customers enough to subsidize the industrial user, contesting the traditional declining price with increasing use and the rate design and schedules as proposed remaining promotional, with both capacity and energy charges declining as the customer uses more power or energy.

Curiously, this record reflects that during the test period, residential customers paid 35.8% of the company's revenue, commercial paid 22.8%, industrial 14.9%, and

public street lighting, public authorities and sales for re-sale accounted for the balance of revenue. For MWH's sold, residential customers accounted for 21.8%, commercial for 16.7%, industrial for 19.8% and public street lighting, public authorities and sales for re-sale accounted for the balance. Considering the total number of customers: residential accounted for 88.3%, commercial for 10.4%, industrial for 1% and public street and highway lighting and sales to public authorities (not for re-sale) accounted for the balance. All of these factors as found and reviewed herein must be considered. However, the "past" fundamental truths such as "growth is always good" and "electricity is always cheap" have been shattered.

The impact of the proposed re-structured rates varies substantially among individual customers because of the vast difference in prices charged for similar services on the numerous pre-existing rates. The low impact rate proposal considered by the Applicant at the request of the Commission during the hearing represents substantial mitigation of the aforementioned impact on some individual customers. It appears that such mitigation is in the public interest. The plan for a gradual implementation of the proposed rate structure, as requested by this Commission, represents an appropriate vehicle for equalization of charges for similar service without requiring immediate undue economic impact. While such a plan may constitute an administrative inconvenience to the Applicant, it nevertheless will provide for achievement of equity among customers in an orderly fashion. Such a transition from traditional promotional pricing practices to a posture of similar charges for similar service is in the public interest.

The Applicant is thus directed to re-structure its tariffs under the "low impact proposal" as requested by the Commission on this record, such rates being closed to new customers and the same shall be cancelled and terminated at the end of the billing month of May, 1976 and 1977, as

provided herein. Tariffs shall be re-structured, considering the additional revenues granted herein and shall be spread over the 3-year period as herein provided. These tariffs shall be implemented and billed after being filed with and approved by the public utility engineer of this Commission, consistent with our findings and order herein.

From this record the Commission concludes that an appropriate rate design should reflect and consider long-run costs to each classification of customer, conserve energy resources, promote economic efficiencies, ease of administration and easier understanding by customers. Demands for increased capacity of generation and transmission facilities and the demands for large amounts of fuel generated by heavy use customers are the principal factors behind the Applicant's needs for increased revenue. This can be accomplished by placing a heavier burden on larger residential users than that placed on the small and medium use residential customers, and also a heavier burden on large commercial and industrial users. This is not accomplished in this Order due to the immediate impact, but we have taken a step in the right direction and will be closer to the objective in 1977.

ORDER

IT IS THEREFORE ORDERED AND DIRECTED:

1. Applicant shall file tariffs designed to recover the revenue deficiency in compliance with the findings made herein.

2. Upon the filing and approval of such tariffs, all current tariffs, rates, riders and special contracts of the Applicant shall be vacated and cancelled.

3. The Applicant is directed to implement the rates herein authorized to be effective on the first billing, thirty (30) days from the date of this Order. It is recognized that all customers are not billed on the same date because of

being billed on different monthly billing cylcles, therefore the Applicant shall not prorate billing between the former and new rate schedules.

4. In order to monitor and supervise the increases granted herein, the Applicant is directed to file monthly operating statements or reports with the Commission for a twelve (12) month period.

DONE AND PERFORMED this 15th day of April, 1975.

CORPORATION COMMISSION OF OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

APPENDIX D

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 8 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

vs.

No. 48,956

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a

limited partnership, and FRATES PROPERTIES, INC., CRYSTAL BOWL, INC., a corporation, HARVARD LANES, INC., a corporation, ROSE BOWL LANES, INC., a corporation, SAHOMA BOWLING LANES, INC., a corporation, SHERIDAN LANES, INC., a corporation, TIFFANY BOWL, INC., a corporation, and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Intervenors.

Petition asking the Court to Assume Jurisdiction and to prohibit the Corporation Commission from enforcing new rates promulgated in Corporation Commission Order No. 112286 in Corporation Commission Cause No. 25346.

JURISDICTION ASSUMED;
WRIT OF PROHIBITION DENIED.

Terry Shipley
Noble, Oklahoma — For Petitioners,

Jack Swidensky
General Counsel
Oklahoma Corporation Commission
Oklahoma City, Oklahoma
and
Robert L. Lawrence
Tulsa, Oklahoma — For Respondents,

Harry M. Crowe, Jr.
Crowe & Thieman
Tulsa, Oklahoma
Charles E. Norman
Rizley, Prichard, Ford, Norman & Reed
Tulsa, Oklahoma

E. H. Gubser
Tulsa, Oklahoma

Larry B. Ferguson
and
Kenneth C. Ellison
Tulsa, Oklahoma — For Intervenors.

BARNES, J.:

This is a class action brought on behalf of Petitioners and all classes of persons receiving electrical service from The Public Service Company of Oklahoma (PSC) under special tariffs which were in effect prior to April 15, 1975, asking that PSC be prohibited from charging and that the Corporation Commission be prohibited from enforcing the new rates promulgated in Corporation Commission Order No. 112286, promulgated April 15, 1975, in Corporation Commission Cause No. 25346.

We are here confronted with the question of what notice, if any, must be given to customers of a public utility before its rates can be changed by the Corporation Commission. The Oklahoma Constitution, which gives ratemaking authority to the Corporation Commission, provides for notice to the utilities (Article 9, § 18), but it does not provide for notice to a patron of the utility. This was recognized and explained in the case of *American Indian Oil & Gas Co.* v. *Geo. F. Collins & Co.*, 9 P.2d 438 (Okl. 1932), where this Court stated:

> " * * * There is no merit in that contention. Consumers are not necessary parties before the corporation commission in a rate hearing and they are not necessary parties in the federal court in an action to enjoin the corporation commission from enforcing a rate fixed by it. Neither the Constitution of the State of Oklahoma nor the legislative enactments require notice to be given a consumer. *The corporation commission represents the consumer and its orders fixing rates are for*

the benefit of the consumer. In Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 46 S.Ct. 408, 410, 70 L.Ed. 747, that court held: ' * * * the commission represents the public and especially the subscribers, and they are properly bound by the decree.' " (Emphasis added)

Petitioners do not question the Corporation Commission's authority to issue such an order, but allege that the notice given them was inadequate to afford them judicial due process. They contend that the due process clause of the Fourteenth Amendment to the United States Constitution requires that notice and hearing be afforded them, and that in the absence of such notice the Corporation Commission's order is void.

This Court has repeatedly held that the power to fix rates in Oklahoma is a legislative function. In *Wiley* v. *Oklahoma Natural Gas Company,* 429 P.2d 957 (Okl. 1967), it was asserted that certain rate increases were void because the Commission was influenced by contributions and favors received from a lobbyist of the gas company. We said:

> "It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules."

And further:

> "It is argued that this Court may vacate the Commission's rate orders established in 1957 and 1963 and order refunds without fixing rates for Oklahoma Natural Gas Company. In Consumers' Gas Co. v. Corporation Commission, 95 Okl. 57, 219 P. 126, this Court held that a natural gas utility is entitled to earn a reasonable return on its investment and a reasonable amount for depreciation and amortization. To hold otherwise would authorize the taking of private property without just compensation, contrary to constitutional provisions.

> How it is possible for this court to strike down the 1957 and 1963 rate orders and thus re-establish rate structures existing prior to 1957 without taking into consideration the financial requirements of the Company during a ten year period of constantly changing state and national economy without fixing rates has not been explained.
>
> "It is is patent that we could not determine the amount of the alleged 'overpayments' and order refunds without either legislating new rate schedules to replace the allegedly void ones, or legislatively placing in effect anew the rate schedules adopted by the Commission prior to 1957."

In *Southern Oil Corporation* v. *Yale Natural Gas Co.,* 214 P. 131 (Okl. 1923), the contention was made that the plaintiff should have received notice of the Corporation Commission's hearing which resulted in its contractual rate for the purchase of natural gas being abrogated. There we held:

> "The contention of plaintiff that it was entitled to notice of the proceedings in which the Corporation Commission established the rate for gas to be charged by the defendant at 15 cents per 1,000 cubic feet, thereby terminating its contractual rights, is likewise without merit. This rate was fixed upon the application of the defendant, and no notice to its consumers or patrons was required. Section 18, art. 9, of the Constitution, provides for notice of at least 10 days to be given by the commission to the company or companies to be affected by any rate charge, classification, order, rule, regulation, or requirement. This clearly means that notice shall be given to the public service corporation who is to be affected by said rate, and does not mean that notice must be given to its patrons. Rate making being a legislative power, notice to parties affected by an order of the Corporation Commission, fixing gas

rates upon the application of the public service corporation, need not be given, unless specifically required by statute. City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 Pac. 396."

We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners, unless specifically required by statute. There is no present statutory provision requiring notice.

Petitioners finally contend that the Corporation Commission was bound by its own rules of practice [OCCRP Rules 12(e) and 8(d)(7)]. We find this contention of Petitioners to be without merit because the notice published in this case substantially complied with the Corporation Commission's suggested form of notice by publication, even to the point of stating that "after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application." This clearly advised all consumers that the Commission might adjust rates in any manner allowed by law. Petitioners do not contend that restructuring of classes is not an adjustment of rates.

Jurisdiction assumed; Application for Writ of Prohibition denied.

LAVENDER, V.C.J., and DAVISON, WILLIAMS, IRWIN and BERRY, JJ., concur.

HODGES, C.J., and SIMMS and DOOLIN, JJ., dissent.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 8 1977
Ross N. Lillard, Jr.
CLERK

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

v.

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a limited partnership, and FRATES PROP-

No. 48,956

ERTIES, INC., CRYSTAL BOWL, INC.,)
a corporation, HARVARD LANES, INC.,)
a corporation, ROSE BOWL LANES, INC.,)
a corporation, SAHOMA BOWLING)
LANES, INC., a corporation, SHERIDAN)
LANES, INC., a corporation, TIFFANY)
BOWL, INC., a corporation, YALE BOWL,)
INC., a corporation, and all other)
members of the Oklahoma Bowling Pro-)
prietors Association served by Public)
Service Company of Oklahoma,)
a corporation,)
Intervenors.)

HODGES, C.J., Dissenting:

The sole issue in this case is whether the "Notice" given was adequate and sufficient to apprise the petitioners that a restructuring of rates among the various classes of tariffs in existence was to be considered at the rate hearing before the Corporation Commission. A recitation of the following facts is necessary for a proper understanding of this issue.

On December 3, 1974, The Public Service Company of Oklahoma (PSC) filed an application seeking additional revenue by distribution of a 12.5% rate increase equally among its customers. The application did not mention a proposal to restructure rates. On December 9, 1974, a notice prepared by the Corporation Commission, after rejection of notice prepared by PSC, was issued which provided in pertinent part:

> "Notice Is Hereby Given that the above named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return

> on its plant, property, and other assets devoted to public utility service in Oklahoma.
>
> * * * * * *
>
> "It Is Further Ordered that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.
>
> "It Is Further Ordered that after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application."

The notice was published and PSC mailed flyers to its customers advising them a rate increase was being sought. It also advertised in certain newspapers that "each customer will pay a proportionate share of the increase." Nothing appeared in any of the notices, mailings, or newspaper advertisements alluding to restructuring of PSC's rates. No further notices were given.

Petitioners do not assert that PSC was not entitled to a rate increase, nor that restructuring of rates might not have been appropriate had proper notice been given. They allege that they were denied due process because of the insufficient, inadequate, and misleading notice given by the Corporation Commission. Instead of determining an adjustment in the rates as the notice stated would be done, the Corporation Commission ordered a restructuring of rates

which abrogated various classes of special tariffs without notice to those affected by the change in rate structure.

The Corporation Commission argues that the clause stating it would grant whatever relief necessary rendered the notice inadequate. I do not agree. The notice did not adequately or meaningfully apprise petitioners of the subject matter of the action. Instead it notified them that a hearing would be held on a matter to which they had no objection, i.e., a proportionate increase in rates to be shared equally by all customers.

Notice is a jurisdictional requirement as well as a fundamental requisite of due process. Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner. The right to be heard is of little value unless adequate notice is given, and due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action.[1]

The failure of due process is amply demonstrated in this case by the fact the Corporation Commission and PSC both knew and realized a "restructuring of rates" was to be an important and integral part of the hearing.

Therefore, in my opinion, the Corporation Commission did not have jurisdiction to enter an order restructuring the rates and the cause should be remanded to the Corporation Commission for further proceedings after issuance of proper notice.

---

[1] *Boddie* v. *Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 119 (1971); *Armstrong* v *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Schroeder* v. *New York*, 371 U.S. 208, 211, 83 S. Ct. 279, 9 L. Ed. 2d 252, 89 A.L.R. 2d 1398 (1962); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 (1915); *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363, 1369 (1914); *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968); *Simms* v. *Hobbs*, 411 P.2d 503, 510 (Okla. 1966).

However, this Court has a duty to guard against any attempt to upset settled and established rate structures by imposition of new requirements which did not exist before; therefore, I would recognize that all procedural modifications enunciated herein should not be construed as invalidating the notice procedures in any other circumstance other than in the case before us, and that the application of the imposition of proper notice standards and procedures should be prospective only except as to the petitioners herein.[5]

I am authorized to state that Justice Simms and Justice Doolin concur in the views herein expressed.

---

[5] See *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 721 (Okla. 1968).

APPENDIX E

OKLAHOMA STATUTES
TITLE 17, SECTION 124
Appeal Regarding Refunds

Any party in interest shall have a right to appeal from any action of the commission to determine the amount of refund due, or to whom such refund shall be made, or from any order or judgment rendered by the commission pertaining to the subject-matter set forth in any of the above sections of this act, in the same manner as appeals are now taken from the Corporation Commission to the Supreme Court.

OKLAHOMA STATUTES
TITLE 17, SECTION 155
Orders and Rules of Commission-Scope-Right of Appeal

The Commission may, from time to time, adopt or promulgate, such orders, rules, regulations or requirements, relative to investigations, inspections, tests, audits, and valuations of the plants and properties relative to inspection and tests of meters as in its judgment may be necessary and proper; provided, that under the provisions of this act, any public utility, corporation, association, company, individual, their trustees, lessees or receivers, successors, or assigns, may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies.

OKLAHOMA CORPORATION COMISSION
RULES OF PRACTICE — RULE 26(b)

RELIEF FROM ORDERS:

* * *

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding. The application shall (1) identify the order sought to be altered or amended, (2) state specifically the parts or provisions sought to be altered or amended, (3) state specifically the amendments or alterations sought, and (4) state specifically the grounds upon which such relief is sought. Notice of hearing of the application shall be served and published as required upon the commencement of a proceeding; and in addition, the applicant shall attach to his application an affidavit stating that he has served a copy thereof by regular mail on each party of record stated in the order sought to be amended, and prior to hearing the applicant shall file the affidavit referred to in Rule 8(d), where applicable. The application shall be set for hearing before the Commission or hearing officer, as provided in these rules as to the commencement of a proceeding.

Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation, ET AL.,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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July, 1977

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In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation; FARMERS UNION COOPERATIVE GIN AT MARTHA; HARMON COUNTY COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT DILL CITY; FARMERS UNION COOPERATIVE GIN AT SENTINEL; PLANTERS COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT ELK CITY; FLEET-TERRAL GIN COMPANY; COTTON FARMERS COOPERATIVE GIN; FARMERS COOPERATIVE GIN AND LUMBER; LINCOLN PROPERTY CO.; RODEWAY INNS, INC.; and G.E.M. 15, INC.; J. H. FRATES and JOHANNA I. FRATES, TRUSTEES; THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC.; CRYSTAL BOWL, INC.; a corporation; HARVARD LANES, INC., a corporation; ROSE BOWL LANES, INC., a corporation; SAHOMA BOWLING LANES, INC., a corporation; SHERIDAN LANES, INC., a corporation; TIFFANY BOWL, INC., a corporation; YALE BOWL, INC., a corporation; and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Respondent Oklahoma Corporation Commission (the "Commission"), submits this brief in opposition to the Petition of Chickasha Cotton Oil Company, et al., for a Writ of Certiorari to review the judgment of the Oklahoma Supreme Court.

I.
OPINIONS BELOW

Petitioners have correctly stated the "Opinions Below" in the Petition.

II.
JURISDICTION

The Respondent denies that this is a proper case for issuance of a Writ of Certiorari but does not deny jurisdiction to consider the Petition.

III.
QUESTIONS PRESENTED FOR REVIEW

1. Does Oklahoma law regarding notice for public rate making hearings contravene the Fourteenth Amendment to the U.S. Constitution?

2. Should a Writ of Certiorari issue when Petitioners have adequate administrative remedies which have not been exhausted?

IV.
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

Petitioners have conspicuously omitted the following statutes and rules which are involved herein and are set forth verbatim in the Appendix as follows:

Okla. Corp. Comm. R. of Practice 25(b) (Appendix B-1)
Okla. Corp. Comm. R. of Practice 25(c) (Appendix B-2)
Okla. Corp. Comm. R. of Practice 26(b) (Appendix B-2)
Title 17, O.S. Sec. 121 (Appendix A-1)
Title 17, O.S. Sec. 122 (Appendix A-1)
Title 17, O.S. Sec. 124 (Appendix A-2)
Title 17, O.S. Sec. 152 (Appendix A-2)

V.
STATEMENT OF THE CASE

The Statement of the Case set forth by the Respondent

Public Service Company of Oklahoma is adopted by Respondent Oklahoma Corporation Commission.

VI.
CONCISE ARGUMENT

A. The Oklahoma Statutes and Corporation Commission Rules are not Repugnant to the Due Process Clause of the Fourteenth Amendment.

It has been held repeatedly that a rate making hearing is essentially legislative in nature and that "Due Process" notice is not required: *Public Utilities Commission of California v. United States*, 356 F.2d 236, 241 (9th Cir. 1966), *cert. denied*, 385 U.S. 816; *Lenihan v. Tri-State Telephone & Telegraph Co.*, 208 Minn. 172, 293 N.W. 601, 605 (1940), *cert. denied*, 311 U.S. 711; and *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 392 F.Supp. 692 (W.D. Okla. 1974), *aff'd*, 511 F.2d 949 (10th Cir. 1975), *cert. denied*, 423 U.S. 875. In the *Teleco* case, the District Court Judge held:

> *"Plaintiff's claim of lack of due process of law by not receiving notice of and an opportunity to be heard before Defendant's tariffs filed with the Oklahoma Corporation Commission became effective is without merit. The tariff procedure utilized under law by state agencies supervising companies which provide public service to the people has been described and characterized as being legislative in nature. And being legislative in nature a due process hearing is not necessary before the tariffs become effective.* Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (Fourth Cir. 1971); Lewis v. Potomac Electric Power Co., 62 App. D.C. 63, 64 F.2d 701 (1933). *This position of Plaintiff is without merit."* (Emphasis added) 392 F.Supp. at 698

It has also been repeatedly held that ratepayers do not have a constitutionally protected interest in any particular level of utility rates. Petitioners apparently contend for a new property right in the utility rates that they enjoyed prior to the entry of the order of the Commission. This "property right" has been denied in a host of cases heard by this Court.[1] Petitioners have cited no case and Respondent has found none establishing a constitutionally protected property right in an existing utility rate. No procedural due process question can exist without the requisite property right. As the United States Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.

[1] *Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537 (1936); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Public Utilities Commission of California v. United States*, 356 F.2d 236 (9th Cir. 1966), *cert. denied*, 385 U.S. 816; *San Antonio Utilities League v. Southwestern Bell Telephone Co.*, 86 F.2d 584 (5th Cir. 1936), *cert. denied*, 301 U.S. 682 (1937); *United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co.*, 47 F.2d 567 (2nd Cir. 1931), *cert. denied*, 283 U.S. 864; *Sellers v. Iowa Power and Light Co.*, 372 F.Supp. 1169 (S.D. Iowa 1974); *Teleco, Inc. v. Southwestern Bell Telephone Co.*, 392 F.Supp. 692 (W.D. Okla. 1974), aff'd, 511 F.2d 949 (10th Cir. 1975), *cert. denied*, 423 U.S. 875.

But the range of interests protected by procedural due process is not infinite.

* * *

And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." (Emphasis in original.) 408 U.S. at 569-71.

The Oklahoma Constitution, Statutes and Commission Rules provide for extensive notice. The required notice was admittedly given and Petitioners do not seriously urge that such notice did not comport with due process standards. Instead, Petitioners attempt to argue that the activities of the utility seeking the increase somehow impaired the notice given. Oklahoma law does not require notice by the utility to the rate-payers. The facts alleged regarding the utility's own description of the form and impact of the increase it was seeking are beside the point. The Commission has the duty of giving notice and did so in compliance with Oklahoma law. The Oklahoma law is fully consistent with the Fourteenth Amendment and this compatibility is not subject to disputes between the ratepayers and the utilities regarding the utility's intentions in seeking an increase in revenues. This Commission cannot be ousted of its proper jurisdiction under Oklahoma law by the activities of the regulated utilities or the ratepayers.

B. The Petition should be denied since Petitioners have effective remedies available before the Oklahoma Corporation Commission.

This case is not appropriate for issuance of a Writ of Certiorari since the Petitioners have other immediate and effective remedies under the Commission's own rules. The Commission has broad regulatory and supervisory control over the public utilities in Oklahoma. 17 O.S. §152 (1971). Petitioners could have gone directly to the Commission to seek relief from what they considered unfair rates. (The Petitioning Cotton Gins who initiated the case below are regulated utilities themselves and know full well the remedies which are available as well as the rate-making procedures generally.) Petitioners chose to seek relief from the Oklahoma Supreme Court and were unsuccessful. Despite that decision, the relief they seek is still available from the Commission, which has continuing jurisdiciton over utility rates. Rule 26(b) of the Commission Rules provides for a new hearing if Petitioners desire:

"RELIEF FROM ORDER:

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding."

Petitioners cannot complain that they do not have access to *immediate* relief since Rule 25(b) provides for

Emergency Orders as follows:

> "(b) *Emergency Orders:* After an application has been filed, the Commission may, upon application of any party, with or without notice or hearing, make an emergency order for the protection of parties of their rights, or in the public interest . . ."

It is puzzling why the Petitioners would burden this Court with a Petition for Writ of Certiorari (presumably compelling another rate hearing before the same Commission with different "notice") when under the Commission's own rules the Petitioners could and can this very day apply to vacate, alter, or amend the offending rate order and obtain a full hearing in connection therewith before the Commission.

The Oklahoma Supreme Court has recognized this right to seek relief from an objectionable rate. In *State ex rel. Oklahoma Natural Gas Co. v. Hughes*, 204 Okla. 134, 227 P.2d 666 (1951), the Court enjoined a trial court from hearing an action attacking a Commission rate order and explained the proper remedies available to the plaintiff:

> "This does not mean that parties feeling themselves so aggrieved are without remedy. They might have appealed from the order of July 9th, 1949. *They may at any time apply to the Corporation Commission for relief from any oppressive, discriminatory, or objectionable rate schedule order, and may appeal therefrom to this court.* Thus may be had a complete judicial review in keeping with the constitution, and a comprehensive attack on rate schedules and practices may thus be made." (Emphasis added.) 227 P.2d a 668-69.

The Petitioners have failed to exhaust — or even adequately utilize — their available statutory remedies. Not only does this call into question the Petitioners' objectives, it fully justifies a prompt denial of the Petitioners' application.[2]

C. CONCLUSION

The Petitioners' case on its face is an inappropriate instance for the extraordinary and discretionary Writ of Certiorari. First, Petitioners admitted below that PSO was probably entitled to a rate increase and that the restructured rates were not necessarily inequitable:

> "It is not the position of Plaintiffs that Public Service Company is not entitled to a rate increase as a result of the proceedings hereinabove referred to, nor is it the position of Plaintiffs that a 'restructuring' of tariffs is necessarily inequitable . . ." (Plaintiffs' Brief in Support of Petition for Writ of Prohibition and Injunction, p. 6)

Secondly, Petitioners failed to perfect a timely appeal of the Commission's Order to the Oklahoma Supreme Court. (The Order was entered April 15, 1975 and the Petitioners

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[2] It should be noted that although the Petitioners did not seek to amend the order by seeking a new hearing under Commission Rule 26(b), the Respondent Public Service Company filed on December 6, 1976 a new application for a rate increase pursuant to Rule 10 of the Commission Rules. A hearing was set, notice given pursuant to Corporation Commission Rules, and eight days of hearings were held with the Petitioners participating. The new Commission Order is imminent and when is issued will supercede the previous order and make the entire issue presented herein moot.

took no action at all until October 3, 1975, more than four and one-half months after the new rates went into effect.) Thirdly, the Petitioners sought extraordinary relief from the Oklahoma Supreme Court and after oral argument to the Court and the filing of numerous briefs were denied that relief. Fourthly, the Petitioners have the right (and have had for the past two years or more) to avail themselves of Rule 26(b) for immediate relief from the Order to which they object but have failed to do so. Finally, the entire question has been made moot by a subsequent rate hearing involving Petitioners and Respondents.

This is not a case of merit or importance. Sound judicial discretion does not require the issuance of a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JACK SWIDENSKY, a member of the Bar of the Supreme Court of the United States and General Counsel for the Respondent, Oklahoma Corporation Commission, hereby certifies that on the 2nd day of July, 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Oklahoma Supreme Court on the following parties:

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APPENDICES

APPENDIX A

OKLAHOMA STATUTES
TITLE 17, SECTION 121
Commission Has Power of Court of Record Regarding Refunds

The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid.

OKLAHOMA STATUTES
TITLE 17, SECTION 122
Judgment for Overcharge-Lien-Collection

Upon ascertaining the amount of overcharge due from any public service corporation, person or firm, the Corporation Commission shall have authority to render judgment against such public service corporation, person, or firm, for the amount of such overcharge that may have been collected from the public in violation of any legal rate, or order of the commission, if necessary to insure the prompt payment of the same to the commission. Such judgment

shall be a lien upon the property of the public service corporation, person, or firm, and shall be collected in the same manner that fines and penalties imposed by the Corporation Commission are now authorized to be collected by law, and, when collected, shall be paid immediately by the commission to the parties to whom it is due.

OKLAHOMA STATUTES
TITLE 17, SECTION 124
Appeal Regarding Refunds

Any party in interest shall have a right to appeal from any action of the commission to determine the amount of refund due, or to whom such refund shall be made, or from any order or judgment rendered by the commission pertaining to the subject-matter set forth in any of the above sections of this act, in the same manner as appeals are now taken from the Corporation Commission to the Supreme Court.

OKLAHOMA STATUTES
TITLE 17, SECTION 152
Commission's Jurisdiction Over Public Utilities

The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the

business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.

APPENDIX B

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 25(b)

ORDERS:

* * *

(b) *Emergency Order:* After an application has been filed, the Commission may, upon application of any party, with or without notice or hearing, make an emergency order for the protection of parties or their rights, or in the public interest, which order shall state, in addition to applicable provisions of sub-paragraph (a) above, the following:

(1) The emergency or circumstances necessitating the order.

(2) Any notice given or hearing held prior to entry of the order.

(3) That the order is temporary, and subject to final determination of the proceedings.

(4) The time limitations of the order, which shall be the date set for hearing or another day certain. Continuance of the hearing shall not serve to extend an emergency order. Any party affected by an emergency order may file written application for a hearing thereon, stating the precise grounds for objection to the order, which hearing may be held upon such notice to other parties as the Commission shall direct.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 25(c)

ORDERS:

* * *

(c) *Stay of Orders:* The effectiveness of an order or its enforcement will not be stayed or postponed by the filing of any application for rehearing or for other relief therefrom. The Commission may by order stay any order pending further hearing, and may stay or postpone the effective date thereof, or enforcement thereof for such time and on such terms as may be just.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 26(b)

RELIEF FROM ORDERS:

* * *

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding. The application shall (1) identify the order sought to be altered or amended, (2) state specifically the parts or provisions sought to be altered or amended, (3) state specifically the amendments or alterations sought, and (4) state specifically the grounds upon which such relief is sought. Notice of hearing of the